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THE LAW ASSOCIATION
OF
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 227.

BOB TALTON, APPELLANT,

vs.

WASH. MAYES, HIGH SHERIFF OF THE CHEROKEE NATION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED APRIL 24, 1893.

(15301.)

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a Pleas and proceedings in the United States circuit court for the western district of Arkansas, before I. C. Parker, judge of the district court, holding circuit court, in the case of Ex parte Bob Talton, petition for writ of habeas corpus.

b In the circuit court of the United States for the western district of Arkansas, February term, 1893, Wednesday morning, 8½ o'clock, Feb'y 15, 1893.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Ex parte Bob Talton, petition for writ of habeas corpus.

On this day come J. H. Akin and files a petition supported by affidavit, praying that a writ of habeas corpus be issued against Wash Mays, requiring him to produce before this court the body of Bob Talton, whom, as alleged in said petition, he, the said Mays, holds in custody, as high sheriff of the Cherokee Nation, and restrains the said Bob Talton of his liberty contrary to the Constitution and laws of the United States, said petition being as follows, to wit:

1 In the district court of the United States for the western district of Arkansas. February term, A. D. 1893.

To the Honorable ISAAC C. PARKER, *Judge of said Court:*

Your petitioner, Bob Talton, respectfully states that he was, on the 31st day of December, 1892, convicted on a charge of murder in a special supreme court of the Cherokee Nation, in Coo-wee-scoo-wee district, and on the same day sentenced to be hanged on the 28th day of February, 1893, whereupon he was committed to the national jail at Talequah, I. T., to await the time of his execution, being held in said jail by Wash Mayes, high sheriff of the Cherokee Nation. Your petitioner further says that the indictment upon which he was convicted was and is illegal, null, and void, and that said so-called indictment was found and returned by a body of five men only, whereas the laws of said Cherokee Nation provide for a grand jury of thirteen men, and do not provide for a grand jury of five men; and by said laws it is provided that no indictment shall be found by the grand jury unless voted for by a majority of their number—that is, by a majority of thirteen, whereas the said illegal body claiming to be a grand jury consisted in all of only five men, and if all voted for an indictment the number was less than that required by law to find an indictment.

Petitioner alleges that upon such a false and pretended indictment by such illegal body as aforesaid he was and is deprived of his liberty
2 and is held in confinement in violation of the laws and constitution of the Cherokee Nation and in violation of the Constitution, laws, and treaties of the United States.

Your petitioner further alleges that on the trial of said pretended charge before the petit jury, and in the empaneling of said jury three of

the jurymen who tried the case admitted on the preliminary examination by the court that they had formed and expressed an opinion in the case which it would require testimony to remove; and on the preliminary examination fourteen of the panel of twenty-four made substantially the same answer, and the defendant having only six challenges could not challenge all of them from the jury. And so the petitioner alleges that he was tried by a jury that was not impartial, but on the contrary had made up their minds against him, and by said partial and incompetent jury on the pretended and void indictment aforesaid he was convicted as aforesaid.

Petitioner alleges that the constitution of the Cherokee Nation provides for "a fair and impartial jury," and that the laws of said nation enacted in pursuance of said constitution were grossly violated in the empaneling said jury.

Petitioner alleges that in the manner and by the means aforesaid he is deprived of his liberty without due process of law, and in violation of the Constitution of the United States, and of the laws and treaties of the United States, and also in violation of the constitution and laws of the Cherokee Nation.

Petition further alleges that in addition to the above, many gross
3 irregularities and errors were committed on the trial to his great prejudice, that the instructions of the court were clearly erroneous, that all the witnesses for the defendant were absent, and the court would not grant a continuance for the same, and was forced into trial over the protest of his attorney.

Petitioner prays the premises considered, that the court will grant him a writ of habeas corpus directed to said Wash Mayes, as high sheriff aforesaid, to produce the body of this petitioner in court, and that on the hearing hereof this petitioner may be discharged from said illegal imprisonment.

(Signed) BOB TALTON,
By his att'y, J. H. AKIN.

Sworn to and subscribed by me this 15th day of Feb., 1893.

STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

Said petition coming on to be heard and the court being well and sufficiently advised in the premises, it is ordered that the writ be issued as prayed for, returnable Feb'y 20, 1893.

4 UNITED STATES OF AMERICA,
Western District of Arkansas:

The President of the United States to George W. Mayes, high sheriff of the Cherokee Nation:

You are hereby commanded to have the body of Bob Talton, detained in your custody, as it is said, together with the day and cause of his being taken, before me at the U. S. court-house in Fort Smith, on the 20th day of February, 1893, at 10 o'clock in the forenoon, and then and there state in writing th' term and cause of his imprisonment and produce your authority for so doing, and hereof you are not to fail under the heavy

penalties denounced by law against those who disobey this writ, and to submit to and receive all those things which shall be then and there be adjudged in this behalf.

Given under my hand this 15th day of February, 1893.

I. C. PARKER,
U. S. District Judge.

(Endorsed on back:) 205. Ex parte Bob Talton. I hereby certify that on this, the 15th day of Feb'y, 1893, at Ft. Smith, Arkansas, I served the within writ of habeas corpus on the within-named George W. Mays, by then and there delivering to him a true copy of the same. Jacob Yoes, U. S. Marshal, by R. B. Creekmore, Deputy. Fees, $2.00; pd. be plff's. atty.

5 MONDAY MORNING, *Feb'y 20th, 1893.*

On this day come' the respondent, Wash Mays, high sheriff of the Cherokee Nation, and makes return to the writ of habeas corpus and files his answer herein, which is as follows, to wit:

To the Hon. ISAAC C. PARKER,
Judge of said court:

Wash Mayes, high sheriff of th' Cherokee Nation, for answer and return to the writ of habeas corbus to him herein directed, respectfully submits to your honor that it is true that the said Bob Talton therein named is confined and restrained of his liberty by the said Wash Mays, high sheriff of the Cherokee Nation, but he alleges that the said Bob Talton is so restrained lawfully and by due process of law, and he says that on the 31st day of December, 1892, he received the following order:

To the H*hg* SHERIFF OF THE CHEROKEE NATION,
Talequah, I. T.:

You are hereby commanded in the name of the Cherokee Nation to receive the body of one Bob Talton and securely hold in th' national prison until the 28th day of February, 1893, between the hours of 10 a. m. and 12 o'clock on said day and date, you will cause the aforesaid Bob Talton to be hanged by the neck until he is dead, who has been convicted of the murder of one Jess Elliott at a special term of the supreme court of the Cherokee Nation in and for the Cooweescoowee district convened on the 26th day of December, 1892, and verdict rendered of guilty on December 31st, 1892.

JOHN WICKLIFF,
Supreme Judge.

WM. H. FRYE,
Clerk pro tem. of the Cooweescoowee District, Cherokee Nation.

6 The original of which order, with the seal of said court attached, is herewith filed and made a part of this return.

That said conviction of murder was had in the supreme court in the said Cooweescoowee district on the 31st day of December, 1892, upon and indictment found by the grand jury of said district on the 1st day of December, 1892, charging said Bob Talton with the murder of the said Jesse Elliott, a copy of which indictment is hereto attached and made a part of this return, which said indictment was duly and in accordance

with the law found by the grand jury of said district duly empaneled in and for the said district, and that said grand jury was composed of five persons selected in accordance with law from the most respectable, intelligent, and responsible citizens of said district, in pursuance of the laws of th' Cherokee Nation, as found in section 51 of the compiled laws of the said Cherokee Nation, which was in force in said Cherokee Nation at the time of the finding of said indictment and at the time of the trial thereon; that thereafter at a special term of the said supreme court of the Cheroeke Nation in and for said district begun and holden on the 26th day of December, 1892, and on the 31st day of December, 1892, a day of said term, the said Bob Talton was, by a jury of said district duly selected, empaneled, and sworn according with the laws of the Cherokee Nation in said court, convicted of murder, and upon said verdict by the sentence and judgment of the said court on said day it was ordered and adjudged that the said Bob Talton for having committed the crime of murder, as declared by the verdict of the jury, by willfully killing Jesse Elliott, be deemed, taken, and adjudged guilty of mur-
7 der, and that for the said crime of murder he should on Tuesday, the 28th day of February, 1893, between the hours of 10 a. m. and 12 o'clock of said day, be hanged by the neck, and that he be taken to the jail at Talequah and there securely kept until the day of the execution; and that the high sheriff of the Cherokee Nation upon the day appointed aforesaid should cause execution to be done as aforesaid; all of which is shown by the record and proceedings of said court now remaining on file therein, true and perfect copies of which are filed herewith, certified under the seal of the clerk of said court and asked to b' taken as a part of this return; and this he says is the true cause of the imprisonment of the said Bob Talton.

Wherefore the said Wash Mays, high sheriff as aforesaid, has here before your honor the body of the said Bob Talton, together with the writ, as therein he is commanded.

This the 20th day of February, 1893.

WASH MAYES,
High Sheriff of the C. N.

Indictment.

CHEROKEE NATION, I. T.,
Cooweeskoowee District:

We, the grand jury of Cooweeskoowee district, after carefully and impartially, and while under our several oaths, having considered certain testimony of sworn witnesses, do hereby charge one Bob Talton with a criminal violation of the law of the Cheroke' Nation, found in section' 5 and 6, article 2, chapt. 4, pages 142 and 143, Compiled Laws of the Cherokee Nation,
to wit: That the said Bob Talton did on or about the third day
8 of December, 1892, and at or about the following place in said district, to wit, the town of Catoosa, Cherokee Nation, Cooweeskoowee district, commit the crime of murder, in this, that the aforesaid Bob Talton did, at or about the time and place aforesaid, willfully, maliciously, and with malice aforethought and premeditated design, effect death, kill Jesse Elliott by cutting the said Jesse Elliott's throat from ear

to ear with a knife, thereby producing instant death; which act so committed was "against the peace and dignity of the Cherokee Nation."

This the 1st day of Dec., 1892.

Attest:

[SEAL.]

H. H. TROTT,
Clerk, Cooweeskoowee District.

SIMON LOVE,
Foreman of Grand Jury, Cooweeskoowee Dist.

I, H. H. Trott, clerk of Cooweeskoowee district, Cherokee Nation, do hereby certify that the above and foregoing is a true and literal copy of the indictment upon which Bob Talton was tried and convicted upon the 31st day of Dec., 1892.

In testimony of which I hereunto set my hand and seal of office on this 2nd day of February, A. D. 1893.

H. H. TROTT,
Clerk of Cooweeskoowee District, Cherokee Nation.

Special term of the hon. supreme court, convened Dec. 26, 1892, at 10 'clock p. m. Hon. John Wickliff, presiding.

The following juror summons:

1. Edward Byrd, com.
2. Grayson Wills, com.
3. D. W. Lipe, dis. on related.
4. Alf Cunningham, com.
5. Jno. C. Schrimsher, dis. on related.
6. Jesse Cochran, com.
7. Dave Martin, com.
8. Ben Fisher, com.
9. John Secondine, com.
9 10. John Morris, com.
11. Johnson Fisher, com.
12. Tom Crutchfield, com.
13. Joe L. Gibbs, rej.
14. William Miller, com.
15. Dave Coker, com.
16. Ed Brady, com.
17. Jasper Ward, com.
18. Joe M. Lahay, com.
19. F. A. Neilson, com.
20. Bean Burgess, com.
21. A. L. McDaniel, com.
22. Geo. Cockran, dis. related.
23. Fred Parsley, dis. related.
24. Mack Ward, com.
25. Josiah Henry, com.
26. Jack Barker, com.
27. Ed Williams, com.
28. A. R. Gourd, com.
29. Jack Williams, com.
30. Levi Henry, dis. related.

Juror sworn and questioned, and the above will show competent jurors and rejected ones.

Called, and solicitor moves to continue said case until next Wednesday, 12, 28, '92. Motion filed. See Doc. "A."

"Special term supreme court in and for Cooweeskoowee district, Dec. 26, 1892. Hon. John Wickliff, presiding.

"CHEROKEE NATION
"*vs.*
"BOB TALLTON. } Murder.

"Now comes the solicitor for said district and moves to continue the above-entitled cause until Wednesday, 28th, at 9 o'clock a. m., for the following reason: That the attorney-general is not present, and the law provides that all prosecutions of murder must be conducted by the said attorney-general, and that the solicitor had intelligence from the executive department that the Hon. R. W. Walker had been appointed during the absence of W. W. Hastings, and that for some unexplained cause the attorney-general has not come. For this reason the solicitor can not safely go into trial.

"Respectfully submitted.

"E. C. ALBERTY,
"*Solicitor.*"

Court granted the continuance. Deft. except to ruling. Hon. court adjourned until Wednesday, Dec. 28, '92, at 9 o'clock a. m.

Dec. 28, '92, hon. spl. term of supreme court, Hon. Jno. Wickliff, presiding, convened according to adjournment.

Juror called and answered to call. Case of—

CHEROKEE NATION
vs.
BOB TALTON. } Murder.

And both answered. Cherokee Nation answered ready. Def. answered not ready, and desire to make a motion. Motion submitted. See Doc. "B."

"In special supreme court of Cooweeskoowee district, Cherokee Nation, December 28th, 1892, Hon. John Wickliffe, presiding. In the case of—

"CHEROKEE NATION
vs.
"BOB TALTON. } Charged with the murder of Jess. W. Elliott.

"Comes now the defendant in the above-entitled cause and moves to quash the indictment in the cause and dismiss the case, and for cause says: That the indictment upon which he is about to be tried is void, having been found by a grand jury composed of only five (5) men, and that such number of men can not and do not constitute a grand jury.

"Further, that said indictment was found by said body of men three days after the grand jury law had been changed by law, and at
11 a time when the law provided for a grand jury of not less than thirteen men. And that to try this defendant under the present indictment is depriving him of his constitutional rights and in violation of the treaties between the Cherokee Nation and the United States.

"BOB TALTON,
"By J. H. AKIN, *his Atty.*"

Both argued the motion. Pl't'f asked for the ruling of the court in writing. Hon. court overruled the motion. Exceptions taken to ruling; motion introduced by defendant for continuance. See Doc. "C."

"In special supreme court, Cooweeskoowee district, C. N., Dec. 28th 1892. In the case of—

"CHEROKEE NATION } Charged with murder.
vs.
"BOB TALTON. }

"Comes now the defendant and moves to continue this case, and for cause says: That he can not safely go into trial on account of the absence of material witnesses which he has used all lawful means to obtain, viz, Wallace Ross, Nancy Markham, Will Adair, and Sarah Tacket; that he expects to prove by said witnesses that they have had long acquaintance with this defendant and knew his disposition and defects, and that they know that when this defendant gets excited that he loses complete control of his mental faculties and becomes utterly irresponsible for his actions, and does not have any power to control his actions.

"BOB TALTON,
"By his atty., J. H. AKIN."

Motion overruled by court and exception taken. Deft. announces ready under a protest that he has been forced into trial without any witnesses.

12 The following juror' was selected to try the case: Edward Byrd, Josiah Henry, Johnson Fisher, Wm. Miller, Alf Cunningham, John Secondine, Tom Crutchfield, Jasper Ward, Dave Martin, John Morris, Jack Barker, A. L. McDaniel.

The hon. spl. term supreme court adjourned until 2 o'clock p. m., 12, 28, '92.

The hon. spl. term supreme court convened according to adjournment 2 o'clock p. m, 12, 28, '92. Hon. Jno. Wickliff presiding. Jurors called and all answered to call. Case recalled and both answered to call. Witnesses called and sworn. Protest filed by deft. See Doc. D:

"In special supreme court, Cooweeskoowee district, Cherokee Nation, in the case of—

"CHEROKEE NATION } Charged with murder.
vs.
BOB TALTON. }

"Comes now the defendant and enters this his protest against being tried by jury now empaneled to try him on the ground that three of the

jurymen, viz, Ed. Byrd, A. L. McDaniel, and Jasper Ward, have admitted to the court that they have found *on* opinion. Your petitioner further says that he had no chance to strike their names from the list, as he only had a right to strike six on the peremptory challenge and that the six names only struck, viz, Grayson Wills, Ben Fisher, Joe Lahay, F. A. Neilson, Ed. Williams, and Mack Ward, all admitted that they had found an opinion as to the prisoner's innocence or guilt.

"BOB TALTON."

Court overruled the protest on the ground that it was filed too late. It ought to have been filed before the juro*r* was empaneled.

13 Exceptions taken by defendant. D'ft. pleads not guilty.

Statement first witness for plaintiff, GEO. HOWELL:

The row commenced at the pool hall at Catoosa, I. Ty. This fellow Elliott stepped on Bob's foot, is what I under' it. Bob knocked him down then, and I believe he kicked him a time or two. Elliott left the room and was gone awhile; come back and Bob hit him with a glass tumbler; Bob said then he guessed he had done all the harm he could and would leave town. We left the pool hall and went to Gravitt' store, Denney, Geo. Long, Bob, and me. This fellow Elliott came riding a horse up there, the horse that I rode in town. Bob asked him where he was going with that horse, and caught the horse and hit the fellow with a bottle, jerked him off the horse and choked him. I and Geo. Long parted them when he pulled him off the horse; I taken Elliott and started him off and Long was holding Bob. Bob got loose from Long and followed, caught him at the south end of the City Hotel, Mrs. Pruett; there is where he was killed, right there; saw Bob catch him and make a lick, could not tell whether he had a knife o*r* not; it appeared to me that he was cutting him; I saw him make the motion; could not tell what he was doing. Bob came out by me and said, "I have, or will, kill the son of a bitch," did not understand which he said. Bob left and went and was gone awhile and come back, picked up Elliott's hat, hung it upon a post.

Q. Did you go up to where they was fighting?

A. Yes.

Q. What did you find when you got there?

A. Found a man cut. He fell just before we got up to him; went up and found his throat was cut.

14 Q. Was he dead?

A. Yes.

Q. Did you see any knife about him?

A. No.

Q. Who is Bob?

A. Bob Talton, the prisoner at the bar.

Q. When Bob hit him with a glass tumbler, did he knock him down?

A. No.

Q. Did you see Bob the next morning?

A. Yes.

Q. Tell the jury if you had any conversation with him and what it was.

A. No; had no conversation.

Q. State to the jury where Catoosa is, and when this killing taken place?

A. Catoosa is about twelve miles down this railroad; the killing was done some time about the first of November—don't know what day—in Cooweescoowee dist., Cherokee Nation.

Q. Did you see Elliott when he came there in the evening?

A. No.

Q. Do you know Elliott?

A. No.

Q. From the appearance of the cut, what had produced this gash in the man's neck?

(Objected to by deft.)

Question withdrawn.

Q. Did you not ask Bob a question about this man he was fussing with?

15 A. Not that I remember.

Cross-examination:

Q. At the time the fuss began in the pool room what was Jess doing?

A. He was playing pool.

Q. What was the forst thing done by Bob when Jess stepped on his toe?

A. Hit him with his fist and knocked him down.

Q. Is it not a fact that he first pushed him and Elliott punched him with a billiard cue in return?

A. Don't know; think he had a cue in his hand.

Q. Was you looking directly at them at first?

A. I was by the side of Bob; was not looking directly at them.

Q. Who did you go to Catoosa with that night?

A. Bob Talton.

Q. Where from?

A. Jim Dougherty ranch.

Q. Whose horses were you and Bob riding?

A. Jim Dougherty's.

Q. Is it not a fact that you and Bob was working on the same ranch and had went off together that night from the ranch riding the ranch horses?

A. Yes.

Q. What condition was Bob in that night with reference to being sober?

A. He was pretty drunk, but could go where he pleased. Elliott was drunk.

Q. Did you see Jess draw the cue as if to strike?

A. No.

(Witness excused.)

16 Second witness for pl't'f:

The night it was done I was in the pool room, and Jess come in and was drinking and commenced pushing the boy around the room; did not mean any harm; had been there about an hour when Bob Talton come, and Jess pushed him back with a cue, stepped on his foot, and

Bob hit him and knocked him down, and the boy taken him off of him and made him let him alone after he had pounded him a while. Bob and Doc. Denney, Geo. Howell, and I went up to Gravitt's store and sit down on the porch. We was sitting there and drinking cider, and Jess come up the street on a horse. Bob saw what horse it was and told him to stop, and he would not stop. Bob went and caught the horse by the rein and told him to get off, and Bob knocked him. Geo. Howell led the horse out of the way; Bob commenced stomping him and stomped him a good while; I taken hold of Bob and told them to take Jess out from under him. Howell taken him from under him. Jess walked round to a post, and I tried to head Bob off and he got the best of me and I coulden't. I played myself out trying to hold him, and I told him to stop and he commenced laughing. He run around me to Jess; I saw him make a pass, but did not see any knife. He made a pass like he was cutting his throat with a knife with his left hand, turned around to me and started down the street, and told me not to say anything about it. I went to Rollings' hotel and went to bed. Bob came in about 4 o'clock in the room where I was, and asked me if I could wake him up by the time the cooks got up in the kitchen. I waked him up when I heard
17 the cooks up, and he got up and went into the kitchen. He came back and laid down on the bed smoking a pipe; he went out, and that was the last I saw of him until last Monday.

Q. When Bob come in the pool hall the first time was he drunk or did he seeme to be drunk?

A. No; he did not seem to be drunk.

Q. In what part of the room was you when Elliott punched him with a cue?

A. In the west, by bar.

Q. When he punched him with a cue did he seem to be mad or did he use bad language?

A. No.

Q. Was he in fun when he punched him as he was when he was pushing the other boy in the room?

A. No.

Q. Did you see Jess after Bob made that pass?

A. I seen him standing there like a man was throwing up; sounded like it. He was standing the last I seen of him.

Q. Did you see Jess after this?

A. Saw him next morning.

Q. State to the jury where he was and the condition he was when you last saw him that night and the condition he was in the next morning.

A. He looked as though he had turned loose of the post and was dead with his throat cut; seems as though he had turned loose of the post and fell backwards.

Q. Is the prisoner at the bar the Bob you speak of in your statement?

A. Yes.

Q. About when was this done?

18 A. On the night of November 3rd, 1892.

Cross-examination:

Q. About how long was it from the time you seen Bob knock Jess off the horse until you seen this pass of the cutting mode?

A. I think about half an hour; had no time.
Q. What were you doing all this time?
A. Was trying to get Bob off of him.
Q. How long after you got Bob off of him until you seen the pass mode?
A. About five minutes.
Q. What was Jess doing during that time?
A. He was laying on the ground.
Q. What was Bob doing during this 5 minutes?
A. He was trying to run around me.
Q. How far was that post from where you seen Bob knock Jess off?
A. About forty feet, I judge.
Q. Now, if Jess was laying on the ground this 5 minutes that Bob was trying to run around you, how did he get to that post?
Objected to by pltff.
Deft. waived the answer to the above question.
Plf. claims the cour*ist* protection of witness.
Q. Is it not a fact that the fight was continu*ance*, and never abated from the time Jess was struck and pulled off the horse until this pass was made at the post?
A. Yes. I was trying to keep him off of him.
Q. Whose horse did Bob seem to think this was that Elliott was on?
A. Don't know.
(Court rules that the witness must be protected, and questions are ruled out.
19 Exceptions taken to ruling.
Witness excused.)
Court adjourned until 12, 29, '92, at 9 o'clock a. m.

Hon. Supreme Court convened according to adjournment, 9 a. m. 12, 28, '92. Hon. Jno. Wickliff presiding. Jurors called and answered to call; all present.

GEO. LONG put back on the stand for cross-examination:

Q. Did Elliott step on Talton's toe in the pool hall before Talton struck him?
A. Yes.
Q. Did he step on his toe accidentally, or on purpose?
A. Don't know.
Q. Did Elliott punch Talton with a cue before or after Talton struck him?
A. Before.
Q. Did he punch him with a cue accidentally, or on purpose?
A. Can not say.
Q. How did it look?
A. It looked like it was on purpose.
Q. About how far was it from where Talton's and Howell's horses were hitched to where Talton pulled Elliott off*f* the horse?
A. About 200 yards.
Q. Did it not appear that Elliott was following him?
(Objected to by plff. on the grounds that it was asking witness'*es* opinion. Court sustained the objection. Cross-examination closed.)

Redirect:

Q. About how long was it after Elliott was pulled off the horse until Elliott was released and went away?

A. About half an hour.

20 Q. Did Elliott walk away from there as soon as he got up on his feet?

A. To the best of my knowledge he did.

Q. Did you see any disposition in Elliott to return again?

A. Not that I noticed; I run around Bob to keep him away; was not looking at Elliott.

Cross-ex.:

Witness excused.

GEO. HOWELL, recalled by plaintiff:

Q. If you saw Bob return to where the fire was in the street by the body—if so, what did he do?

A. He run his horse through the fire.

Q. Did he say anything when he run his horse through the fire?

A. No; I think not.

Cross-examination:

Q. What was your and Bob's condition with reference to being sober?

A. Was not sober.

Q. Had you drank any before you come to town?

A. Yes; don't know how much; 3 of us drank something less than a ½ gallon of whiskey.

Q. Did you drink anything after you come to town, you and Bob?

A. Yes; some cider, and Bob got some beer.

Q. How far was it from your and Bob horse was hitched from where Bob pulled Elliott off the horse?

A. About 60 yards.

Q. Was your horses hitched together?

A. Yes.

Q. Was Elliott following Bob when Bob pulled him off the horse?

21 A. Don't know whether he was or not; rode up to Bob.

Redirect:

Q. Was not Bob sitting down when Elliott rode up to where you was?

A. Yes; Geo. Long, D. L. Denney, Bob, and myself.

Recross-ex.:

Q. Did you see Elliott make any effort to strike Bob while he was on the horse?

A. No.

Q. How long did that fight last where Elliott was pulled off the horse?

A. 5 or 10 minutes, I think.

(Witness excuse').

Deft. having cross-examined witness introduced by plff. and announced himself through with cross-ex., plff. announces that they was through with them and they could go home, to which defendant objected and

asked the court. Court sustained rule 12, claiming that it applied to this case, and that deft., in order to hold witness, he would have to summons them as his witness.

Deft. excepts to ruling of the court on the ground that the rule *sight*ed does not apply.)

Statement, third witness for plff., JOE WARREN:

I did not see the man killed; saw him after he was killed. Doc. Denney come and woke me up and we went out where he was laying and his throat was cut from ear to ear. Then I got some kindling and made a fire, and stayed most of the night. After the fire was burning pretty well, Bob Talton come riding a horse. The horse jumped over
22 the fire; he turned the horse and rode back to the fir' and sit on his horse, and then he got down and come to the fire and said to the parties standing around that he had killed the man. Then he went over to where the man was killed, and he pushed his head over (his head was somewhat crooked after laying there some time), and spoke to the dead man and told him to hold his head up, and said that he was not dead—he was just possuming. That is as near as I can remember the circumstance to the best of my knowledge.

Q. Did the horse voluntarily jump over the fire or did he force him over?

A. Don't know whether he did or not; but jumped over the fire.

Q. How did he push his head over?

A. With his foot.

Q. Did he push head over with force, as if to kick the body?

A. Used a little force.

Q. Did he use this force in a rough manner?

A. He acted like it.

Q. How long did he remain at the body before he went away?

A. Some 4 or 5 minutes.

Q. Did the deft. come back afterwards again?

A. Not while I was there?

Q. While the deft. was at the body did you see him take hold of anything or pick up anything from the body—what was it?

A. Pencil and book.

Q. Was the pencil and book on the ground or in the deceased' pocket?

A. In his upper vest pocket, on left side.

Q. What did he do with the pencil and book—the defendant?

A. Threw the book behind him and put the pencil in his pocket.

Q. Did the deceased have a hat about him anywhere?

A. Not when I saw him.

23 Cross-examination:

Q. What was Talton's condition with reference to soberness?

A. He was not to say drunk, nor was not to say sober.

Q. What do you call drunk?

A. When a man is under the influence of whiskey and not competent of knowing what he is doing.

Q. Then a man can't be drunk and know what he is doing, can he?

A. Can't answer that question.

Q. Why?

A. Not well enough experienced in the matter.

Q. Then your statement that a man to be drunk must be under the influence of whiskey to such an extent that he is not competent of knowing what he is doing is not true, is it?

(Objected to by plaintiff under rule 12, Supreme Court. Court sustains the objection, under rule 12th, and says that deft. must make him his own witness. Defendant excepts to ruling.

Witness excused.)

The hon. court adjourned until 10 o'clock p. m. 12, 29, '92.

Hon. court convened according to adjournment. Jury called, and all present.

Statement of fourth witness for plaintiff, Dr. E. J. WARREN:

I was in bed asleep, and about 11 o'clock or later Doc Denney come to the door and knocked and asked if Dr. Warren was at home. I told him I was; he said there was a dead man out on the street; said it would be a shame to let him lay there and let the hogs eat him, and to get up and help take care of him. I asked who it is, and he said Jess Elliott. I put on my clothes and went out to where the body——

(Objected to the part where Denney said to him, and ask to
24 exclude it by deft. Court overruled the objections; ruling excepted to.)

After I got out there I said: "We can do no more than to make a fire and take care of the body until we can get orders from proper authorities." I then proposed to make a fire and take care of the body until we could get orders from the authorities from Claremore; in regard to the authorities me and my boy made a fire.

Ques. by PRO'CUTION.

Q. Was you personally acquainted with Jess Elliott, the deceased?

A. Yes.

Q. After seeing the dead body, did you recognize it?

A. Yes; it was Jess Elliott.

Q. Did you notice any wounds on that body?

A. Yes; his throat was cut from one side to the other.

Q. Was that a wound sufficient to cause death?

A. Yes.

Q. Did you notice any other wounds on the body?

A. No.

Q. Where was this that you saw this dead body and when you first discovered it?

A. 6 or 7 feet from the south end of the hotel known as the Mrs. Cromwell House, in Catoosa, Cooweescoowee district, C. N.

Q. Did you see anything of this deft. there after you went to the dead body?

A. Yes.

Q. What was he doing?

A. After I got the fire I heard some one coming galloping up the street and rode over the fire. He turned and come back. I went then
25 away about 15 or 20 minutes. The deft. was sitting down with others reading a letter when I come back; I was sitting with my back

to Elliott, and Dr. Johnson was sitting to my left. He called my attention to the deft. and he put his foot against Elliott and said, "Wake up, you are not asleep, just 'possuming;" stepped around and put his foot against his head and shook him a little and said, "Wake up; you are just 'possuming, not asle'p." Deft. stopped there some time, a couple of hours—paid no attention to time—and then went out to the ranch.

Cross-examination:

Q. What was the condition the deft. was in with reference to being sober at the time?

(Objected to under rule 12, as new matter not brought out in his examination in chief. Objection sustained and ruling of court excepted to. Witness excused.)

Statement of Dr. J. E. JOHNSTON for plaintiff:

About 12 o'clock at night of the 3rd, I think—I am not positive as to the night—Doc. Denney and Bill Jackson come to my door, woke me up, telling me there was a dead man on the street. I asked who it was; they said they did not know. Asked them who killed him. I went with them up to the hotel; there I saw this dead man Elliott. Jackson asked what should be done with the body. I told him that we had better go to the depot and get some authority to take the body off the ground. Went and woke up the agent and he commenced to wire, and in a few minutes I stepped to the door and seen a man a riding up on a horse and called to me and asked what I was doing there, and I told him I was trying to get some authority to move that dead body off the ground.

He then said to me that he wanted some advice. This was Bob
26 Talton. He said to me that I had done that myself, and wanted to know what to do; said what would I do if it was my case. I told him that if it was me I would just go as far as I could go and a good deal farther, in a rough manner. There was several others standing on the depot, Vergion Jackson, the agent, and some more; don't know who they were. He then shook hands with us and told us good-bye and got on his horse and rode off. In about an hour or hour and a half the agent and I went back to where there was a fire built up. He was there or came in a short time after I got there—the deft., I mean. He stayed awhile and then went off; don't know where.

Q. In the remark that the deft. made to you in regard to your advice, did he mention any person's name that he had done anything to?

A. No.

Q. When he asked your advice and said he had done that, did he say what he had done?

A. Yes.

Q. What did he say?

A. I killed that fellow myself; called no name.

Q. Did you notice any wounds on the body?

A. Yes; his throat was cut from ear to ear.

Q. Are you a practicing physician, doctor?

A. Yes.

Q. Was that wound sufficient to produce death?

A. Yes, sir.

Cross-ex.:

Q. Have you stated all that occurred there that night with reference to this killing and what led up to it?

(Objected to by pl'ff. Court sustained the objections. Excepted
27 to rule.)

Q. In your examination in chief you stated, "he wanted some advice—this was Bob Talton—he said to me that I done that myself." Is that true?

A. Yes, sir.

Q. Is that the only time he made that remark to you in substance?

A. I think it is.

Q. Can you state whether it was or not?

A. Yes; the only time he made it direct to me.

Q. Did he make it to anyone els' in your presence and hearing?

A. Don't remember that he did.

(Witness excused. Plaintiffs risks their case with right of rebuttal.)

First witness for deft., J. B. JOHNSON:

I was in company with these parties in the early part of the night, up to the time I went to bed at 10 o'clock. Between 6 and 7 o'clock that night I went to the pool hall; there I found Elliott, Denney, and some others; they seemed to be drinking and arguing over the election and making a great deal of fuss; in a short time Bob Talton, Howell, and Long came in. Talton seemed to be in a fine humor, laughing, but seemed to be drinking a little; he had not been in a great while till I hear a scuffling behind me, I was at the counter with my back towards the counter. Elliott and Talton seemed to be in a fight or scuffle like; when I looked around behind me they both fell on the floor. Talton jumped up and kicked him, then it appeared as if he was trying to spur or kick him in the face; and I taken hold of Bob and told him not to do that. When
28 I told him to quit he said all right, Dod, if you say so, or something like that, and said he can't mash people's toes in Catoosa, and then went away from him; after I hear Elliott say there is nothing between us and Bob said no, it's all right, and, I think, played a game of pool together. I think he and Denney and Bob played quite a while and then quit. Myself and Long went out and played a game of pool; during that time Denney, Bob, and Elliott was all up towards the counter, seemed to be busy engaged in hollowing over the election and hollowing for Cleveland and having fun; I went back and sit down where I was when Bob came in after I had played pool. There was a crowd at the counter with Bob drinking; I heard some noise like a glass pop some way. I see Elliott going down behind the counter as though he was squatting down and not knocked down, and I saw glass fall off his hat brim. Vergin remarked then, I am going to close up; let's all get out. Vergin came around to me and said I think it would be a good idea to just let that man lay there behind the counter, he is drunk as a fool anyway. Vergin closed up, and he and I went home. In a short time after I had got home, maybe 20 minutes, Bob Talton and Howell, Long and Denney came to my gate, and Bob called to me and I went out to them. Bob stood and talked to me quite a while about his trial at Muskogee and other things, nothing

particular. Bob went off and left them; said that Denny could talk to Doc. about Cleveland. About an hour after Bob left Howell came to my house and said let's go and get Vergon and get some cider; he would not get up for him and wanted me. Vergin and me went back of Rollings' lot. When we got there Vergin said he would not go as he heard Bob Talton and Denney out there, and I told him I would go, that I was not afraid;
Howell said he would go and get them to go to Groyitt's store,
29 and he said they had all cider they needed and dident want to let them have any more; so I waited until he went and got them; I went in and Vergin told me before I went that there was a Winchester in there and to be very careful, that there was no telling what that man would do; when I got in he said who is that, and I told him and he said all right. I told him to lay still that I just wanted to get some cider. I hid the Winchester and drawed the cider and went back with it. Vergin and I then afterwards went back, woke up Elliott and told him he had better go to bed; got him out of the door and tried to get him to go to the hotel, but he wouldn't go; remained there, seemed to be somewhat drunk. Vergin and I went back in the house in a few minutes; when we came out Etser and Elliott came to the door after we had got out and just close to the door, Etta said, this man wants to go to bed; Doc., you take him and go to the hotel with him. I went nearly to the hotel with them, I turned and went around the lot, nearly the same way Vergin and I went, to my stable; then went to bed.

Q. What was the condition of Elliott, Talton, Denney, Long, and Howell as to being sober or drunk?

A. Bob Elliott and Denney I think was pretty drunk.

(Witness excused.)

Second witness for deft. Mrs. JANE ROGERS' statement:

I am the mother of the defendant; he is about 19 years old, I guess. He was born in 1873.

Q. State what his mental condition is with reference sanity or insanity, and what produces it, if you know.

A. At times he is kinder crazy. Just before his birth my mother had a crazy girl waiting on her, and after she found out I was in the
family way with Bob she turned her off would not have her
30 about her.

Q. Is there anything that would effect him during childhood and up to the present time which would tend to balance his mind?

A. When he would get mad he would try to kill everything, just like that girl would.

Q. Can you state any circumstances of his insanity?

A. Yes; he would get mad. He had one of them spells at Beatrice Marchum's in 1884 or 1885.

Q. What caused them spells?

A. When he gets excited. I taken him to the seminary about '85, and Mr. Ross refused to take him into the school; said he was dangerous to have among the children when he would have those spells. He would have those spells all during his childhood; but he is getting better as he gets older.

Q. Do you remember of any circumstance when he would imagine he had killed any one?

A. Yes; he told me at Mrs. Hayes' that he had killed Joe Trapp. She wanted to go see about him, and Bob would not let her.

(Objected to by plaintiff. Court sustained objection. Excepted to by deft.)

Q. Was Joe Trapp killed?

A. No.

Q. Do you know any other circumstance except those stated?

A. He would catch little turkeys and eat them raw when he was little.

Cross-examination:

Q. How long did your son go to school?

A. From '78 up to '85 or '86; went to West Point up to '83,
31 and then to seminary.

Q. How did he progress in school?

(Objected to by defendant. Objection overruled and exceptions taken.)

A. I don't know. I never seen him read in a book.

Q. Do you know whether your son can write or not?

A. He can sorter write; don't know whether he learned at seminary or where he learned it.

Q. How long since your son had one of those spells you spoke of?

A. About 4 years; he has been away from me; since then I don't know what he has done.

Q. About how far from your home to where he has been staying?

A. I don't know. Part of the time at Catoosa and in Creek Nation; about 15 miles to Catoosa.

Q. What kind of business has your son been in since he left?

(Objected to by deft. on the grounds that it is not cross-examination and is not brought out in chief. Objection overruled. Exceptions taken by deft.)

A. Have not seen him doin' anything but walking about in Catoosa.

(Witness excused.)

Third witness for deft., MINTA WALTON:

Q. Are you acquainted with Bob Talton?

A. Yes.

Q. How long have you known him?

A. About 12 or 14 years.

Q. Have you been about him much during that time?

A. Yes; considerably for about nine months.

Q. Do you know whether or not he is rational at all times or not?

A. Don't think he is. His mother always called him a fool and I always thought he was one.

32 Q. Was he always that way, or by spells?

A. Just once in a while.

(Witness excused.)

JANE ROGERS recalled:

Q. State, if you know, what remedy was applied to Bob Talton when he would have these spells.

A. Throw water on him.

(Witness excused.)

Fourth witness for deft., WM. TACKETT:

Q. Do you know the deft., Bob Talton?

A. Yes; since '77.

Q. Have you been about him much?

A. Not a great deal. He was in my house about six months.

Q. Do you know his condition with reference to sanity or insanity?

A. He acted sometimes very curious.

Q. Did he act rational or irrational?

A. He used to catch young chickens and eat them up alive. I have seen him taken clothes off and go about over the prairie naked, with his clothes under his arm or leave them laying in a pile. He was this way only at times.

Cross-examination:

Q. About how long has it been since he acted this way—the way you speak of?

A. It was in 1877.

Q. How old was he then?

A. About four or five years old.

Redirect:

Q. Have you been about him much since then?

33 A. No.

(Witness excused.)

Court adjourned until 12—30, '92, at 8 o'clock a. m.

The hon. sp'l term Supreme Court convened according to adjournment 8 a. m., 12—30, '92, Hon. Jno. Wickliff presiding. Jurors called and jurors all present. Prisoner called and Cherokee Nation.

Fifth witness for deft., D. L. DENNEY:

Q. At the time Elliott rode up to where you, Talton, Long, and Howell were, what did Talton have in his hand, if anything?

A. He had a bottle. I had just handed it to him to take a drink.

Q. How long after Elliott rode up or after you handed Talton the bottle before Talton got up and went to the horse?

A. Not very long. He either said, "Where in the hell are you going with that horse?" or, "Where did you get him?"—can't say which; he then went around on the east side of the horse and the boys followed him and I heard them say, "Don't do Bob."

Q. How long after that did that fight last?

A. It couldn't be more than a minute or a minute and a half.

Cross-ex.:

Q. What was your condition with reference to being intoxicated?

A. I was about as drunk then as I am now.

Q. Then you had not taken many drinks, then?

A. As or about as much as I have taken this morning before breakfast; don't know how many.

Q. Can you state the condition as to the deft. at that time as to his mind, whether he was very much intoxicated or not?

A. He acted very much like he was drunk; he acted like he was drinking when I handed him the bottle.

34 Q. What was the actions of the deft.?

A. He and another man come up behind me and I handed him the bottl'; he was staggering and his head was wadd'ing around.

Q. Did you know the man on the horse at that time?

A. No; not at that time.

Q. After that man on the horse was down on the ground did you see anything that was going on, after he was down on the ground there?

A. Yes.

Q. State what you seen occurring between the deft. and the deceased after the deceased or Elliott was off the horse and down on the ground.

A. I walked around—the horse was going south—walked around the horse's head on the east side; there was a man standing there and I walked up to his left and he was a stranger; don't know his name; Bob was laying on his back and another man to his right laying on his right side and a man standing over each one of them.

Q. About how long did they remain in that condition?

A. 'Bout till—not very long.

Q. Did you see anyone help either of them up?

A. No; did not either one get up.

Q. Did you see Elliott going or go away from there?

A. Yes.

Q. Don't know how Elliott came to be laying on the ground, do you?

A. No.

Q. When you first noticed Elliott laying on the ground, you stated you didn't know how long he lay on the ground; you don't know how long it was after you saw him laying on the ground until he went away, do you?

A. No, not exactly; but not very long.

35 Q. When Elliott was going away what was the deft. doing?

A. Did not see him.

Q. Did you see anyone start after Elliott to pursue him?

A. No.

Q. Did you see anyone trying to hold Bob after Elliott started off?

A. No.

Q. You see no one after?

A. No.

Q. Where was you at the time Elliott started away?

A. Did not notice the deft.

Q. Did you see Long and Howell there?

A. Saw two strangers.

Q. How far was it from where Elliott was knocked off the horse to where he was found dead?

A. 100 ft., more or less.

Q. How long after Elliott went towards the hotel before you saw th' dead body?

A. Not very long; don't think it was over a minute.

Q. How did you come to see this body?

A. Started out to the street south; at southwest corner of the hotel I saw 2 men; they was 7 or 8 feet, and was standing and the other was

going away; passed between me and the southwest end of the hotel. This man I recognized to be the man on the , and looked like a man that was sick; he was standing in a position that a sick man would throwing up, standing by a post; post was leaning to the west; his right shoulder against the post and his right arm around it, his head resting against the south side of the post. I went ar*a*round and got close to him, and was in about three feet of him, and I heard the blood
36 gushing from his throat as one throwing up. I looked down on the ground and saw it was blood. I looked up at him to see if I knew him, and I diden't; then he let go of the post and fell on his back, his head to the east or southeast. After he fell I went to his head and looked to see if I knew him. After he fell he tried to breathe 2 or 3 times, and then he was dead. I turned and walked back to the street, and heard someone say he thought it was the man in the pool hall, and I went back and looked, and diden't think was Jesse.

Q. Did you recognize the man standing at the post or the man going away?

A. No.

Q. When was the next time you saw the deft.?

(Objected to by deft. Objections overruled and exceptions taken by deft.)

A. After I went back to the dead man, went to the street and said, "That man's dead," and asked, "Where is that man's horse?" and some one said, "Here it is."

Q. Who was that man?

A. Don't know; they called him George.

Q. When was the next time you saw the defendant?

A. Shortly after I was at the dead body Bob come to me and said, "I killed that man; I cut his throat."

Redirect:

Q. Who was with Elliott when you seen him go around the corner of the hotel bareheaded?

A. Saw no one but Elliott; did not know it *was* Elliott at that time, but it was the man that was on the horse and the man that was killed.

Q. If anyone had been with them would you have seen them?
37 A. Yes.

Q. Did anyone pass around the corner of that house after Elliott passed until you saw that man at the post and the man coming away from it?

A. If they did I did not see them.

Q. If anyone had been following him would you not have seen him?

A. If he had been close to him I would.

Q. How long after Elliott passed the house until you saw him again at the post?

A. Don't think it could be more than half a minute; it was as long as it took me to walk about 40 feet; I was walking slow.

Witness excused.

Dr. J. B. JOHNSON recalled on the grounds of omission:

Q. You may state if the deft. said anything else in connection with the words "he can't step on people's toes in Catoosa."

A. Yes; or punch me in the belly with a billiard cue.

Q. You may state whether at the time the deft. was at the fire that night you noticed anything strange or unusual about his appearance?

A. I did; he did not appear to be drunk; he appeared to be wild.

Cross-examination:

Q. The action was rather *or* unusual exciting occasion, wasn't it?

A. I thought it was.

Redirect:

Q. Did the occasion seem to excite him, or did he simply seem to look wild?

A. Can't say whether it was the occasion or not.

38 Q. Did he do things that an ordinary man under similar circumstances would have done?

A. I thought he acted very strange on the occasion.

Cross-examination:

Q. In what way was his action strange?

A. His actions over the dead body was unjust to his fellow-men.

Q. Were the actions you speak of such as evinced a total disregard for human life on that occasion?

A. I thought it did.

(Witness excused.)

BEATTRIS ROGERS, statement for deft:

I am a sister of Bob Talton.

Q. Do you know whether or not he is at all times sane?

A. I don't know.

Q. Have you ever saw him do anything that a sane man wouldn't do?

A. Seen him have one of them spells one time; I guess it was something.

Q. What did he do at that occasion?

A. He didn't get mad; he only got mama down on the bed and hit her over the eye and bit a piece out of her arm, made a blue place, and then tried to get his knife, and Mr. Jim Hasting taken him off; about four years ago.

(Witness excused.)

J. E. GUNTER, statement for deft:

Q. Where were you at in the night when it is said Jesse Elliott was killed?

A. I was in the pool hall.

Q. Were you there the time the fuss originally occurred between

39 Elliott and the deft. when it is said Elliott stepped on his toe?

A. I was there.

Q. You may now state what connection and conversation you had with Elliott after that, if any.

A. After the first fight occurred Elliott got up, and he said, "I am a friend, and want to be a friend to all of you," and then set up th' cider to them and Bob. After he done that he and I went to the hotel; went down there, and he wanted me to look and see if his eye was black. I got the lamp and looked and told him his eye was not black at all; then

he wanted to go back to the pool hall; I insisted on him going to bed; he said he didn't want to go to bed; he said, "If you will go with me down there we will go down and whip some of them son of a bitches;" I told him no, that I would not go; told him I was a friend of all the fellows, and if he wanted to whip them he would have to whip them all by himself. "Well," he said, "if you will change hats with me I'll go down there." I would not change hats for awhile, and insisted on him going to bed and tried to keep him from going there; he kept on wanting a hat, and finally I let him have it; he went back to the pool hall; I went and watched him go in the house; after he had been inside 5 or 10 minutes I went back to the pool hall; Elliott was standing at the end of the bar when I went in; he was standing there with his hands on the counter and his head on his arms; just as I closed the door Bob threw a glass at him.

Q. Did Elliott offer you anything to let him have your hat while at hotel?

A. No; he did not.

Q. Did he at any other time?

40 A. Yes; he did just after we left the hotel. He offered me $4.00 in silver.

Cross-examination:

Q. Did Elliott give you any reasons for wanting your hat?

A. No.

Q. Did you see the deft. next morning?

(Objected to by deft. Court overrules the objection, and deft. excepts to ruling.)

A. Yes.

Q. Did you have any conversation with him?

A. Yes.

Q. State the conversation.

A. That morning I got up and went into the sitting room of the hotel. Bob was standing at the middle door. I sit down; he came and sit in a rocker chair and smoking. I knew he and Elliott had a fight that night. I asked him where Jesse was, and he told me he was laying out in the street where I killed him. I thought he was joking, and I made some fool remark, and he said, By God, I su'e killed him; I cut his God dam' throat from one ear to the other. He got up and went to the middle door again. While he was at the door he asked me if I had a horse there. I told him no, and asked him where his horse was that he had rode to town that night. Told me he had taken the horse to the ranch and walked back. I asked why he done that, and he said, I don't know what in the hell I wanted to come back to town for. He turned around to Alice Payne and asked Alice for her horse. She told him that her horse was not at home. He then went out, and I saw him about a mile from town.

(Objected to all the conversation by the deft., and asks to have

41 it excluded. Objections overruled and except. taken.

Witness excused.)

Court adjourned for one hour for dinner at 1 o'clock p. m., 12–30–'92.

The hon. sp'l term supreme court convened according to adjournment, Hon. John Wickliff presiding. Jurors called and all present and all answered to call. The plaintiff and defendant announced closed and ready for argument.

Deft. asked that the court give the instructions to jury as contained in Doc. "E," to wit:

"If the jury find from the testimony that Talton killed Elliott without previous design to effect death, while in the heat of passion, and not in self-defense, but in a cruel and unusual manner, he is not guilty of murder, but manslaughter. 2nd. If the jury find from the testimony that Talton killed Elliott while said Elliott was attempting to commit an unlawful act, or after such attempt shall have failed, he is not guilty of murder, but manslaughter. 3rd. If there is a reasonable doubt in the testimony of the whole case the deft. is entitled to acquittal."

(Objected to by the plaintiff. Court sustains the objections and deft. takes exceptions to ruling.)

The hon. judge charges the jury, as shown in Doc. "F," to wit:

"GENTLEMEN OF THE JURY: The defendant is indicted for the crime of murder. I will read you the law defining murder. The defendant has set up as a defence the plea of insanity. When the plea of insanity is urged as a defence against the commission of an unlawful act the burden of proof is on the defendant to show to the satisfaction of the
42 jury beyond a reasonable doubt that the defendant was at the time and previous to and connecting with the time of the killing of such unsound or insane mind as to not know the consequences of his acts. You are the sole judges the wei/ght of all the evidence given in before you on this trial, both as to whether the defendant was insane at the time of the killing and previously up to the time of the killing, or whether he has sufficient reason at the time to know that he had violated the law, if he did the killing. You are also to decide upon all the evidence in relation to the killing as to whether the defendant, if the evidence satisfies you that he did the killing, was justified in the act of taking human life or not under the law that I have read or referred you to. It is your duty to carefully weigh the evidence well, and after you have done so and are satisfied in you' minds beyond a reasonable doubt that the defendant did take the life of Jess Elliott in the way and manner charged in the indictment it will be your duty to render a verdict of guilty. But, on the other hand, of you find from the evidence beyond a reasonable doubt that the defendant was insane at the time of the killing and had been so insane previously up to the time of the killing as to not know the consequences of his act, or, in other words, that he did not know that he had violated any law, then, in that case, it will be your duty to render a verdict of not guilty." And instructed to render a verdict at 9 o'clock a. m., Dec. 31, '92.

The hon. court adjourned until 9 a. m., 12, 31, '92.

The hon. spl. supreme court convened according to adjournment this Dec. 31, '92, at 9 a. m., Hon. John Wickliff presiding. Juror returned with the following verdict of guilty, as follows:

"We the jury unanimously agree and render a verdict of guilty of the charge as found in the indictment, this 12, 31, '92.

"JOSIAH HENRY, *Foreman of Jury.*"

43 Prisoner called and asked if he had anything to say why sentence should not be passed upon him. Prisoner answered, "I deny that I have had a fair and impartial trial." Hon. judge of supreme court, John Wickliff, passed sentence upon the deft. Bob Talton, as follows:

"Bob Talton you have by a jury of your countrymen found guilty of the crime of murder. The court in the discharge*d* of its duty must now pronounce upon you the sentence the law says shall follow a conviction of murder. Have you anything to say why that sentence shall not now be passed? The court in passing this sentence is but the mouthpiece of the law which you have been found guilty. You are convicted of murder of Jesse W. Elliott. The evidence shows that you became enraged at Jesse Elliott at the billiard hall because he stepped on your toes, accidentally; that you knocked him down and beated him; after all that you and Elliott parted as friends, but come across him on the street again where you killed him by cutting his throat from ear to ear. There is no question about his having been killed in the manner and by the means named in the indictment. There is no question but what you killed him; the jury after hearing all the facts named in murder. For this crime the law says he who has committed it and been convicted of it by a jury of his countrymen shall pay the forfeit with his own life. You have much to answer for; you are in a position where your greatest duty is to yourself, to review with care the acts of your past life and especially the one which resulted in the death of Jesse Elliott; you must fully comprehend its wrong and its wickedness, and after this you must seek for-

44 giveness for the act from the only power which can give this forgiveness. Such an act as this can only be forgiven by the source of all charity and all mercy; you must approach your God with true repentance and sincere sorrow before you can expect to receive that aid from the Author of all things good that you no' stand so much in need of. For your own sake I beseech you to seek your God, to ask His forgiveness, to invoke His merciful power to assist you in removing from your soul the stain of crime upon it. If you are to race away from your soul the great load of guilt now darkening it and remove from your conscience the dark and bloody stains upon it you have no time to lose, but you are called upon by the highest duty to yourself to prepare by every means in your power to stand before your God to answer for your crime; then do everything in your power to obtain forgiveness for the wrong you have done your fellow-men. If you could live your life over again you would shun these great evils. This, of course, you can not do now; but others may wisely take heed from your fate and shun the life that has brought you to your present condition. May you receive that mercy which we are taught is for all who will properly seek it. Listen now to the sentenc' of the law, which is: That you, Bob Talton, for having committed the crime of murder, as declared by the verdict of the jury in your case, by willfully killing Jesse Elliott, be deemed, taken, and adjudged guilty of murder and that the said crime of murder. You will, on Tuesday, the 28th day of Feb'y, 1893, between the hours of 10 a. m. and 12 o'clock of said day, be hanged by the neck until you are dead; and that you will now be taken to the jail at Talequah; you will there securely kept until the day of execution appointed as aforesaid, and that

the high sheriff of the Cherokee Nation, upon the day appointed
45 as aforesaid, will cause execution to be done on you; that you will be taken by the high sheriff on the day of execution aforesaid from the jail where you will then be confined to the place of execution within the enclosure of the national prison at Talequah for the crime of murder committed by you, as aforesaid, be hanged by the neck until you are dead, and may God have mercy on your soul."

Order issued to high sheriff to execute sentence.

The hon. special term supreme court adjourned.

W. H. FRYE, *Clerk pro tem.*

I, H. H. Trott, clerk of the Coowcescoowee district, Cherokee Nation, do hereby certify that the within and foregoing "twenty-six and a fraction pages" is a true, full, and complete copy of the proceedings in the case of the Cherokee Nation *v.* Bob Talton, tried before Hon. John Witcliff, as supreme judge of the northern judicial circuit of said nation, beginning on the 26th and ending on the 31st day of December, A. D. 1892, as shown by the records in my office; and I further certify that W. H. Fry was the duly appointed and acting clerk of said court; also, that the indictment appended hereto is a true and literal copy of the indictment upon which the said Bob Talton was tried in said case. In testimony of which I hereunto set my hand and seal of office on this 28th day of January, A. D. 1893.

H. H. TROTT,
Clerk of Coowcescoowee District, Cherokee Nation.

46 In the circuit court of the United States for the western district of Arkansas, February term, 1893, Wednesday morning, 8½ o'clock, March 15, 1893.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Ex parte Bob Talton. Habeas corpus.

On this day come, the petitioner in person and by his attorneys, Geo. A. Grace, esq., and J. H. Akin, esq., and come, the respondent, Wash Mayes, high sheriff of the Cherokee Nation, in person and by his attorneys, Wm. M. Cravens, esq., and Robt. W. Walker, esq., and this cause coming on for hearing by the court upon the petition for a writ of habeas corpus, the writ and the return thereto. Whereupon, after hearing the argument of counsel, the court took the matter under advisement.

FRIDAY, *March 17, 1893.*

Ex parte Bob Talton. Habeas corpus.

On this day this cause came on for final hearing by the court upon the petition for a writ of habeas corpus, the writ and the return thereto, the same having heretofore been argued by counsel for the petitioner, Bob Talton, and the respondent, Wash Mayes, high sheriff of the Cherokee Nation. And the court, having well and sufficiently considered the

premises, is of the opinion that the writ should be discharged and the petitioner remanded to the custody of the said Wash Mayes, sheriff aforesaid, and it is so ordered.

47 Section 14, on page 19, Laws of the Cherokee Nation, as follows, to wit:

"Every bill which shall pass both branches of the national council shall, before it becomes a law, be presented to the principal chief; if he approve he shall sign it, but if not he shall return it, with his objections, to that branch in which it may have originated, who shall enter the objections at large on their journals and proceed to reconsider it; if, after such reconsideration, two-thirds of that branch shall agree to pass the bill, it shall be sent, together with the objections, to the other branch, by which it shall be reconsidered, and if approved by two-thirds of that branch it shall become a law. If any bill shall not be returned by the principal chief within five days (Sundays excepted) after the same has been presented to him, it shall become a law in like manner as if he had signed it, unless the national council, by their adjournment, prevent its return, in which case it shall be a law, unless sent back within three days after their next meeting."

Section 61, page 101, relating to grand jurors, as follows, to wit:

"At least fourteen (14) days before the commencement of the first regular terms of the circuit and district courts, in each year, the judges of both courts shall each furnish to the sheriff of each district a list of five names of persons, to be selected from the most respectable, intelligent, and responsible citizens of the district, who shall be summoned to act as grand jurors for that district during the year, and to sit during the

48 regular terms of the court, respectively, unless sooner discharged by the court, and, if required by the solicitor, for any other period not more than five days, and at or near the regular place of holding court, after the adjournment of the court. No person summoned to serve as grand juror shall be exempt from service, except on account of personal sickness, severe or dangerous sickness in his immediate family, or recent death and before burial of any member thereof. In case of the absence of any person summoned as grand juror, his place shall be filled by some competent person, who shall, if necessary, be summoned by special writ."

The new jury law, approved Nov. 28, 1892, as follows, to wit:

"An act repealing the act of the national council approved April 21st, 1886, entitled 'An act amendatory of chapter three, article five, of the Compiled Laws of the Cherokee Nation relating to juries,' and amending section fifty-four, article five, and section sixty-one, article six, of the said chapter three, Compiled Laws of the Cherokee Nation.

"Be it enacted by the national council, That the act of the national council approved April 21st, 1886, and entitled 'An act amendatory of chapter three, article five, section fifty-one, of the Compiled Laws of the Cherokee Nation, relating to juries,' be, and the same is hereby, repealed.

"Be it further enacted, That section fifty-four, of chapter three, of the Compiled Laws, be amended so as to read, after the word 'clerk,' in the seventeenth line of said section, but in all other criminal cases the clerk shall summon eighteen, after the same have in like manner

49 been drawn by the sheriff, who shall be empaneled as above, the prosecution objecting to three, and the accused or court selecting

the twelve out of the remaining fifteen to try the case. No verdict shall be rendered in any criminal case without the unanimous consent of the whole jury: Provided, That at all special terms of the district and circuit courts for the trial of criminal cases, when there shall be more than one case to be tried, there shall be thirty names drawn and summoned, according th chapter three, article five, section fifty-one, of the Compiled Laws, who shall serve as jurymen for that term of court.

"Be it further enacted, That at least fourteen (14) days before the commencement of the regular term of the circuit and district courts in each year the judges of both courts shall each furnish to the sheriff of each district a list of thirteen names of persons, intelligent and who shall have attained the age of twenty-one years and are otherwise qualified as jurymen, citizens of the district during the year, and to sit during the regular terms of the court, respectively, unless sooner discharged by the court, and the solicitors of the several districts shall not be authorized to convene a grand jury between the regular terms of the court, except in cases for capital offenses or cases of felony, and only when there is apprehension that the accused will escape beyond the jurisdiction of the Cherokee Nation in such cases of felony. No person summoned to serve as grand juror shall be exempt from service, except on account of personal sickness, severe or dangerous sickness in his immediate family, or recent death, and before the burial of any member thereof. In case of the absence of any person summoned as grand juror his place shall be filled by some competent person who shall, if necessary, be summoned by special writ.

"Be it further enacted, That section sixty-six of said article six is hereby amended so as to read: 'No indictment shall be found by the grand jury unless voted for by a majority of their number.' And provided further, That all jurors shall receive two dollars per day's service as juror.

Section 66, page 103, is as follows:

"A majority of the grand jury may find an indictment."

Section 62, page 271, relating to publication of penal laws, as follows:

"The principal chief shall be required to cause to be published all the acts of the national council, 'prescribing a penalty' for their violation in either or both of the ways provided for in the 7th article of the treaty of July 19, 1866, as to him may be deemed best for the public interest, within twenty days after the close of the session of the national council passing such acts; and he shall cause to be entered a certificate of the manner of the publication upon the register of his office; and he may require any officer of a district to post such laws in his district as he may require of him."

Section 33, on page 90, is as follows, to wit:

"The judges shall hold their respective courts in each district commencing on the days following, to wit: In Delaware and Going Snake on the first Monday in May and September; in Coo-wee-skoo-wee and Flint on the second Monday in May and September; in Talequah and Illinois on the fourth Monday in May and September; in Canadian on the last Monday in April and August of each year."

Section 85, on page 111, is as follows, to wit:

"Any of the judges shall have the power to call and hold a special term of court for the trial of criminals for offenses over which they respectively

have jurisdiction. And when a case shall be reported by the sheriff to the judge having jurisdiction, he shall bring the accused to immediate trial, without further delay than shall be necessary to enable both parties to obtain testimony, according to the provisions of law in relation thereto, unless the accused shall give bail for his appearance at the next regular term of the court, to which time, in such case, the trial may be postponed."

52 I hereby certify that section 14 of the Cherokee constitution is correctly set out above.

That section 61 of the Cherokee statute relating to grand juries; that the new grand jury law and the law repealing another statute approved by the Cherokee council Nov. 28, 1892, and section 66, page 103, of the Cherokee statute, and section 62, page 271, relating to the publication of the Cherokee penal laws; and section 33, page 90, and section 85, page 111, of the Cherokee laws are all correctly set out in this record. That said laws were all introduced before me on the hearing of the habeas corpus case of Bob Talton.

Given under my hand this 30th day of March, A. D. 1893.

I. C. PARKER,
U. S. Dist. Judge, Holding Circuit Court.

53 WEDNESDAY, *March 29, 1893.*

Ex parte Bob Talton. Habeas corpus.

Comes petitioner, Bob Talton, by his attorney, Geo. A. Grace, esq., in open court, Wm. M. Cravens, counsel for respondent being present, and prays an appeal from the judgment of the court to the United States Supreme Court, which is granted, and the clerk of this court is ordered to forthwith make a duly certified transcript of the record in this cause and transmit the same to the clerk of the said Supreme Court.

54 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, do hereby certify that the foregoing is a true and complete transcript of the record in the case of ex parte Bob Talton, on petition for writ of habeas corpus, as the same appears of record and on file in this office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 25th day of March, A. D. 1893.

STEPHEN WHEELER, *Clerk,*
By I. M. DODGE, *D. C.*

(Indorsement on cover): Case No. 15301. Term No., 227. Bob Talton, appellant, vs. Wash Mayes, high sheriff of the Cherokee Nation. W. Arkansas C. C. U. S. Filed April 24th, 1893. Supreme Court U. S., clerk's office. Received Apr. 8, 1893.

O

Indictment.

CHEROKEE NATION, I. T.,
Cooweeskoowee District:

We, the grand jury of Cooweeskoowee district, after carefully and impartially and while under our several oaths, having considered certain testimony of sworn witnesses, do hereby charge one Bob Talton with a criminal violation of the law of the Cherokee Nation, found in sec. 5 and 6, article 2, chapt. 4, pages 142 and 143, Compiled Laws of the Cherokee Nation, to wit: That the said Bob Talton did, on or about the third day of November, 1892, and at or about the following place in said district, to wit, the town of Catoosa, Cherokee Nation, Cooweescoowee district, commit the crime of murder, in this, that the aforesaid Bob Talton did, at or about the time and place aforesaid, wilfully and maliciously and with malice aforethought and premeditated design to effect death, kill Jesse Elliott by cutting the said Jesse Elliott's throat from ear to ear with a knife, thereby producing instant death, which act so committed was "against the peace and dignity of the Cherokee Nation."

This the 1st day of Dec., 1892.

SIMON LOVE,
Foreman of Grand Jury, Cooweeskoowee District.

Attest:
H. H. TROTT,
Clerk Cooweeskoowee District.

I hereby certify that the above and foregoing is a true copy of the original as on file in this office, the same being the indictment upon which Bob Talton was convicted on the 31st day of Dec., 1892.

Witness my hand and seal on this the 18th day of Feb'y 1893.

[SEAL.] H. H. TROTT,
Clerk Cooweeskoowee District, C. N., I. T.

UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript annexed to this certificate is a true and complete copy of the indictment contained in the record filed in this court on petition for habeas corpus in the case of Bob Talton.

The original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this 31 day of January, A. D. 1896.

[SEAL.] STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

Office Supreme Court
FILED.
MAR 9 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895

BOB TALTON, Appellant,

vs.

WASH. MAYES, High Sheriff, &c., Appellee.

No. 227.

Suggestion of Error in the Record, and Petition to have the same Corrected.

Comes the appellee in this case and suggests and states to the court, that in the printed record of this case there is error, in this, to wit, the indictment against the appellant is endorsed as being found by the grand jury on the 1st day of December, 1892, and the said appellant is charged in such indictment with committing the crime of murder on or about *the 3d day of December, 1892.* (Rec., p. 4.)

This is a mistake, as the original indictment, on file in the Cooweescoowee District, of the Cherokee Nation, Indian Territory, charges, in fact, that said crime was committed on the *3d day of November, 1892*, and appellee presents, with this suggestion, showing the truth of this statement, a certificate from H. H. Trott, Clerk of the said Cooweescoowee District, and also a certificate from Stephen Wheeler, Clerk of the Circuit Court of the United States for the Western District of Arkansas. And he asks the court to consider such certificates as part of this suggestion and statement.

The mistake in copying the indictment was not observed by counsel for appellee, although the record had been examined and the brief prepared upon it, until the filing of the brief of appellant in this case, and it is a mistake, as the court will observe, quite easily to be made. But even on discovering it at this late date, no delay or other injury can be worked in taking the necessary steps to correct the record, as the case can not, in all probability, be reached on the call of the docket for a month to come, and it was the duty of appellant to produce here an exact and true copy of the indictment and proceedings below.

Wherefore, he moves the court, that the record in this respect be corrected, or considered as corrected, or if not, a writ of *certiorari* issue to have the same corrected, with an order therein, if need be, directing the original indictment to be transmitted to this court.

A. H. GARLAND and
R. C. GARLAND,
For Appellee.

I, representing the appellant in this case, acknowledge service of the notice to present this motion for Monday, 2d day of March, 1896.

Feb'y 6, '96.

LEONIDAS D. YARRELL,
Att'y for Bob Talton.

DISTRICT OF COLUMBIA, *sct:*

I, A. H. Garland, one of the counsel for appellee in the above-entitled cause, do solemnly swear the matters and things stated in the foregoing petition are true, as I do verily believe; and as stated on my own knowledge I know to be true; and as stated on information I believe to be true. This February 7, 1896.

A. H. GARLAND.

Subscribed and sworn to before me at Washington, D. C., this 7th day of February, 1896.

[SEAL.] C. A. NEALE,
Notary Public.

INDICTMENT.

CHEROKEE NATION, I. T., }
Cooweeskoowee District. }

We, the Grand Jury of Cooweeskoowee District, after carefully and impartially, and while under our several oaths, having considered certain testimony of sworn witnesses, do hereby charge one Bob Talton with a criminal violation of the law of the Cherokee Nation, found in secs. 5 and 6, article 2, chap. 4, pages 142 and 143, compiled laws of the Cherokee Nation, to wit: That the said Bob Talton did, on or about the third day of November, 1892, and at or about the following place in said District, to wit, the town of Catoosa, Cherokee Nation, Cooweeskoowee District, commit the crime of murder, in this, that the aforesaid Bob Talton did, at or about the time and place aforesaid, wilfully and maliciously, and with malice aforethought and premeditated design to effect death, kill Jesse Elliott, by cutting the said Jesse Elliott's throat from ear to ear with a knife, thereby producing instant death, which act so committed was "against the peace and dignity of the Cherokee Nation."

This the 1st day of December, 1892.

SIMON LOVE,
Foreman of Grand Jury,
Cooweeskoowee District.

Attest:

H. H. TROTT, *Clerk,*
Cooweeskoowee District.

I hereby certify that the above and foregoing is a true copy of the original as on file in this office, the same

being the indictment upon which Bob Talton was convicted on the 31st day of December, 1892.

Witness my hand and seal on this the 18th day of February, 1893.

[SEAL.] H. H. TROTT, *Clerk*,
Cooweeskoowee District, C. N., I. T.

UNITED STATES OF AMERICA, }
Western District of Arkansas. }

I, Stephen Wheeler, clerk of the Circuit Court of the United States for the Western District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the indictment contained in the record filed in this court on petition for habeas corpus in the case of Bob Talton. The original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 31st day of January, A. D. 1896.

[SEAL.] STEPHEN WHEELER, *Clerk*.
By J. M. DODGE, *D. C.*

[Endorsed:] No. 227. Bob Talton. Copy of indictment. Suggestion of error in the Record, and petition to have the same amended by *certiorari* or otherwise.

FILED
JAN 20 1896
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 227.

BOB TALTON, APPELLANT,

vs.

WASH MAYES, HIGH SHERIFF OF THE CHEROKEE NATION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR APPELLANT.

ELIJAH V. BROOKSHIRE,
LEONIDAS D. YARRELL,
BEN. T. DUVAL,
Counsel for Appellant.

Hayworth Pub. House, 615 F Street N. W., Washington D. C., 1896.

being the indictment upon which Bob Talton was convicted on the 31st day of December, 1892.

Witness my hand and seal on this the 18th day of February, 1893.

[SEAL.] H. H. TROTT, *Clerk*,
Cooweeskoowee District, C. N., I. T.

UNITED STATES OF AMERICA, }
Western District of Arkansas. }

I, Stephen Wheeler, clerk of the Circuit Court of the United States for the Western District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the indictment contained in the record filed in this court on petition for habeas corpus in the case of Bob Talton. The original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 31st day of January, A. D. 1896.

[SEAL.] STEPHEN WHEELER, *Clerk*.
By J. M. DODGE, *D. C.*

[Endorsed:] No. 227. Bob Talton. Copy of indictment. Suggestion of error in the Record, and petition to have the same amended by *certiorari* or otherwise.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 227.

BOB TALTON, APPELLANT,

vs.

WASH. MAYES, HIGH SHERIFF OF THE CHEROKEE NATION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

The petitioner, Bob Talton, was, on the 1st day of December, 1892, indicted by a so-called grand jury of Cooweeskoowee District, Cherokee Nation, I. T., for the killing of Jesse Elliott "on or about the third day of December, 1892," said so-called grand jury consisting of only five men. (Rec., pp. 4 and 5.)

On the 28th day of December following plaintiff was put upon trial against his protest, and convicted on said false indictment, and upon the 31st day of December sentenced to be hanged on the 28th day of February following, and committed to the National jail at Talequah, to await his execution, in custody of the defendant, Wash. Mayes, high sheriff of the Cherokee Nation.

On the 15th day of February, 1893, Bob Talton presented through his attorney, J. H. Aikin, to the Hon. I. C.

Parker, Judge of the District Court of the United States for the Western District of Arkansas, his petition for a writ (Rec. 1 & 2) of *habeas corpus*, against said Mayes, alleging among other things, that he was held and restrained of his liberty by said Mayes in violation of the Constitution, laws and treaties of the United States, and also in violation of the Constitution, laws and treaties of the Cherokee Nation, in that the indictment upon which he was convicted was and is illegal, null and void, having been found and returned by a body of five men only, when the laws of said Cherokee Nation provided for a grand jury of 13 men, and required a majority of that number to vote for the indictment before it could be legally found. And further in that he was denied "a fair and impartial jury" in the trial court, it being admitted that three of the jurymen who tried the case had formed and expressed an opinion which it would require testimony to remove, thus depriving him of his liberty, without due process of law, and in violation of the Constitution, laws and treaties of the United States, and the Constitution, laws and treaties of the Cherokee Nation. Said writ was granted by Judge Parker on the 15th of February, returnable on the 20th of February. In response to said writ, the said high sheriff Mayes brought before Judge Parker the body of said Bob Talton and the record of his trial and conviction and commitment to his custody. (Rec., p. 4.)

On the 15th day of March, 1893, the case came up for hearing in the Circuit Court of the United States for the Western District of Arkansas, Judge Parker presiding, upon the petition for writ of *habeas corpus*, the writ and the return thereto, including the record of his trial and conviction and

the Indian laws bearing thereon, and was argued by counsel and taken under advisement by the Court. And on Friday, March 17, 1893, the cause came up for final hearing in said Circuit Court, and the writ was ordered to be discharged and the petitioner remanded to the custody of said Mayes, sheriff as aforesaid. (Rec., pp. 26–7.)

On March 29 following, petitioner Bob Talton, by his attorney, prayed an appeal from the judgement of the Circuit Court discharging the writ of *habeas corpus*, to the Supreme Court of the United States, which was granted (Rec., p. 29), and the Record certified to this Court.

SPECIFICATION OF ERRORS.

The Circuit Court erred in entering the decree of March 17th, 1893, ordering that the writ of *habeas corpus* "should be discharged and the petitioners remanded to the custody of the said Wa h. Mayes, sheriff as aforesaid" (Rec., pp. 26 & 27).

The appellant insists that it was clearly shown by the record before the Circuit Court that he was held for trial, and tried on an *illegal* and *void* indictment; that said "indictment" was found by an *illegal body* of *five men calling* themselves a *grand jury* (Rec. pp. 4 & 5); that the alleged indictment itself charged appellant with committing the alleged offense "*on or about the third day of Dec.*, 1892," two days after the so-called "indictment" was found, said "indictment" having been found Dec. 1st, 1892 (Rec. pp. 4 & 5), thus charging an impossible date, a date not then in existence, that the old Cherokee law under which the alleged grand jury was apparently previously empanelled (if it ever had any legal force and effect at all, which is denied) was repealed by the act of the Cherokee Nation approved Nov.

28th, 1892, fixing the number of persons to compose a grand jury at *thirteen* (Rec. pp. 27 & 28), and that he was, and is, restrained of his liberty without due process of law, and in violation of both the Cherokee and the United States Constitutions, laws and treaties, and should have been discharged from custody by the Circuit Court, and is now entitled to have the writ of *habeas corpus* awarded by this court, and to be discharged from custody, no appeal lying from the judgment of the Indian Special Supreme Court to any other court, Indian or Federal, by which it was possible to bring up for correction any of the illegal actions of said Indian Court, and no jurisdiction having ever been legally obtained by said Indian Court over the cause, or over his person, to try or sentence him for any offense whatsoever, imaginary or real.

BRIEF OF ARGUMENT.

The first question naturally arising in this case is whether the Federal Courts have jurisdiction to issue the writ of *habeas corpus* in a case where an Indian is confined under the sentence of an Indian Court for an offense committed against an Indian within the limits of an Indian Territory.

The second is whether the so-called grand jury which indicted the appellant was a legal body under the Constitution and laws of the United States and of the Cherokee Nation, and whether the indictment was legal or void.

And if it was not a legal body and the indictment was void, whether the action of the Indian Special Supreme Court in holding, and trying and sentencing the appellant upon such false indictment, was mere error, and irregularity in the proceed-

ings, or whether it was vital and jurisdictional? and entitles the appellant to his discharge from custody.

1st. We think there can be no question as to the right of the Federal Courts to issue the writ of *habeas corpus* in such a case where an Indian is held in confinement in violation of the Constitution, laws and treaties of the United States.

There can be no question as to the exclusive jurisdiction of the General Government over the Indian Territories; it has always been exercised by Congress, *ad libitum*, and the Indians have always been regarded and treated as wards of the Nation, and peculiarly entitled to its guardianship and watchful care.

The Territory was created by act of Congress within the geographical limits of the United States, and out of territory under the sole and exclusive jurisdiction of the Federal Government, and if it had been the intention of Congress to have placed such Territory without the pale of the Constitution it would have been impossible for it to have done so.

It will doubtless be contended by the Cherokee Nation that the Federal courts have no power to issue writs of *habeas corpus* so that the same shall operate upon the authorities of the Cherokee Nation; that the Cherokee Nation is a sovereign not bound or controlled by the provisions of the Federal Constitution.

The relation which the five civilized tribes bear to this Government has been the subject of much controversy, but has never been fully defined in any judicial opinion. In the great case of the Cherokee Nation *vs.* State of Georgia, Chief Justice Marshall declared that the Cherokee Nation was not a State of this Union; that it was a dependent political community, subject to the supervision and control of the Federal

Government; that its people were in a state of pupilage, practically wards of the Government. It is true that the Federal Government has granted to them the right of self government, but this does not make it sovereign. Mr. Justice Miller, in U. S. *vs.* Kagama, 118 U. S., 230, says: "These Indians are within the geographical limits of the United States; the soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two."

In the U. S., *ex. rel.* Standing Bear *vs.* George Crook, general, etc., 5 Dillon, 453, Judge Dundy held "that an Indian is a person within the meaning of the *habeas corpus* act, and has a right to sue out the writ, etc."

By the treaty of 1832 between the United States and the Cherokees, the latter agreed that their "laws shall not be inconsistent with the Constitution of the United States, and such acts of Congress as have been or may be passed regulating trade and the intercourse with the Indians."

In the case of "The Cherokee Tobacco" 11 Wallace, 616, it was held "that the revenue laws of the United States applied to the Cherokee Indian Territory notwithstanding a prior treaty to the contrary."

In Mackey *vs.* Cox, 18 How., 103. held that The Cherokee Indian Territory is a Territory of the United States, and Mr. Justice McLean delivering the opinion of the court said "they are not only within our jurisdiction but the faith of the nation is pledged for their protection."

"In some respects they bear the same relation to the Federal Government as a Territory did in the second grade of government under the ordinance of 1787; such territory passed its

own laws, subject to the approval of Congress and its inhabitants, were subject to the Constitution and act of Congress. This, however, is no reason why the laws and proceedings of the Cherokee Territory, so far as it relates to rights claimed under, should not be placed upon the same footing as States of the Union. It is not a foreign, but a domestic Territory, a Territory which originated under our Constitution and laws."

By act of Congress of May, 1890, the Constitution is expressly extended to the Indian Territory, and the tribes are permitted to make certain laws which are not "contrary to the treaties and laws of the United States." (Supp. to Rev. Stat. U. S., 2d Ed., 735.)

Mr. Justice Field, delivering the opinion of the court in U. S. *vs.* Thomas, 151, U. S., page 585, said: "The Indians of the country are considered as the wards of the Nation, and whenever the United States set apart any land of their own as an Indian reservation, whether within a State or Territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full protection in their persons and property, and to punish all offenses committed against them, or by them within such reservations."—(Id. page 586.)

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they reside. It must exist in that government, because it never existed anywhere else, because the theater of exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

The Fourteenth Amendment to the Constitution provides that "all persons born or naturalized in the United States and subject to the protection thereof are citizens of the United States and of the State wherein they reside."

An Indian is a person within the meaning of the *habeas corpus* act. (U. S. *vs.* Crook, 5 Dill, 453-464.)

The writ has often been issued by the United States Court for the Western District of Arkansas in cases where an Indian was the applicant, and in some where the applicant was held by order of an Indian court.

Ex parte Kenyon, 5 Dill, 385.

Ex parte Reynolds, 5 Dill, 394.

In the case of *ex parte*, Ball Christie, in the United States Court in the Indian Territory, (not reported in any of the reports, but reported fully in the daily *Hesperian*, Gainesville, Texas, of November 7, 1893, from which this extract is taken) in which the same questions arose that are involved in this case, and in which Judge Stuart granted the writ of *habeas corpus* and discharged the prisoner from custody. In that case Judge Stuart in a very able and exhaustive opinion said, among other things:

"Can it be said that there is now, or ever has been, a place or a people in this Union who were not controlled by its supreme law? The very statement of the proposition refutes it. Here is a people under the exclusive control and supervision of the United States permitted to exercise the right of self-government, but by the very terms of that permission made subject to the fundamental law of the Federal Government. It is true that the Indian is not a citizen of the United States, but it is also

true that he is not an alien. He is under the protection of the Federal Government and this protection has been guaranteed in every treaty made with these tribes. It cannot be true that this Government intended to establish these political communities surrounded as they are by sovereign States and leave them free from constitutional restraint and control. To my mind, it is perfectly clear that when this Government gave these tribes the power to enact their own laws, conduct their own government and try and punish their own people, it intended that these privileges should be exercised and enjoyed subject to the control and limitations of the Federal Constitution. Can it be said that an Indian's life or liberty may be taken away without due process of law? That there is a place within the broad domain of this Union, surrounded by free men, where the great charter of human liberty, the Constitution of the United States, is inoperative? Is there a place in this Government where life and liberty and property are rendered unsafe and insecure by an abridgement or denial of those fundamental rights which exist independent of the Constitution, and without which government becomes despotism, and its people cease to be even free? Surely not.

Further, by the treaties between the United States and the Indian tribes, white men, citizens of the United States, are permitted to intermarry with Indians and become members of these tribes. Is it possible that these white men, born in the United States, subject to its laws and entitled to its protection, can be denied by these Indian tribes the guarantee of the Constitution? It would certainly be a startling spectacle to see a white man born in one of the States of this Union, who, perhaps, has never traveled be-

yond the geographical limits of this Union, tried and convicted and sentenced to death in utter disregard of the Constitution of the United States. These considerations lead me to believe that if these applicants have been denied that constitutional protection, due process of law, they are entitled to be discharged.

The power of Federal courts to interfere for the discharge of persons held by a State, in violation of the Constitution of the United States, was much discussed in the argument of this cause. Judges, according to their different views, have much disagreed as to the limit of this power. I am one of those who believe that the cases are few and rare where a person held in the custody of a sovereign State should be discharged by a Federal court in the collateral proceedings of *habeas corpus*. But this much seems to be settled, that if the State court had no jurisdiction of the person or subject matter, then we have a case where a Federal court has a right to discharge from custody, because if the court which tried has no jurisdiction of the person or the cause, it has no power to try, no power to pronounce judgment, no power to condemn; the whole proceeding is a nullity, and the imprisonment is consequently illegal. As was said by Judge Caldwell in *ex parte* Ulrich, 43 Federal Reports, 663: "It is only where the trial court is without jurisdiction of the person or the cause, and a party is subject to illegal imprisonment in consequence, that the writ of *habeas corpus* may be invoked and the party discharged from the illegal imprisonment." If a Federal court has the constitutional right thus to invade a sovereign State and discharge a prisoner from its custody, a *fortiori*, it has the power to discharge a person illegally imprisoned, from the custody of these Indian tribes

which are not sovereign, but political dependencies of the Federal Government."

From the above extracts it will be plainly seen that the United States Government has declared both in its treaties and laws that these tribes can enact no statute which is in conflict with the Constitution of the United States, and that each individual Indian within the Indian Territory is entitled to its immunities, privileges and guarantees, and can invoke the aid of the Federal courts to protect and secure the same when they are abridged, or denied, whether by authority of the Indians, or otherwise.

The new Grand Jury Act, approved Nov. 28th, 1892, reads as follows:

"*Be it further enacted*, That at least fourteen (14) days before the commencement of the regular term of the circuit and district courts in each year, the judges of both courts shall each furnish to the sheriff of each district a list of thirteen names of persons, intelligent and who shall have attained the age of twenty-one years, and are otherwise qualified as jurymen, citizens of the district during the year, and to sit during the regular terms of the court, respectively, unless sooner discharged by the court, and the solicitors of the several districts shall not be authorized to convene a grand jury between the regular terms of the court, except in cases for capital offenses or cases of felony, and only when there is apprehension that the accused will escape beyond the jurisdiction of the Cherokee Nation in such cases of felony. No person summoned to serve as grand juror shall be exempt from service, except on account of personal sickness, severe or dangerous sickness in his immediate family, or recent death, and before the burial of any member thereof. In case of the

absence of any person summoned as grand juror his place shall be filled by some competent person who shall, if necessary, be summoned by special writ." (Rec., p. 28.)

The old grand jury law is identical with the new, save it provides for *five persons* instead of thirteen. (Rec., p. 27.)

The Fifth Amendment to the United States Constitution says: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;" nor be deprived of life, liberty, or property. This binds the Federal courts, not the States. But the Fourteenth Amendment binds the States in the same language as to due process of law. So in both aspects of the Constitution the grand jury act providing for only five persons was beyond the power of the Cherokee Council to enact, and void, because of its repugnancy to the Constitution.

But if we are mistaken in the last proposition, then we contend that the act of November 28, 1892, repealed the former grand jury act and substituted a grand jury of thirteen instead of the jury of five members. (See both acts, Record, p. 27-8.)

The new act was duly passed and approved before the day on which the alleged indictment was found. It named no day on which it would take effect, and consequently it took effect from its approval by the executive, November 28, 1892.

The Cherokees claim here that the new law did not go into effect till fourteen days before the next regular term in May. But the regular term of the District court, to which the act applied also, would begin in January. (Cherokee Laws Sec. 33, p. 91, and sec. 47, p. 96.) The Circuit and District courts each have a grand jury. The grand jury of the Cir-

cuit Court presents indictments for offenses cognizable before it and also for murder and manslaughter cognizable before the Supreme Court. There are three circuits. Such a construction would require the new law to go into effect at a different time as regards the two courts and also as regards the different circuits; by piece-meals and at intervals—a law in part of the nation, but not in another part.

It is provided that the National penitentiary at Tahlequah shall be used to confine prisoners awaiting trial. (Cherokee laws, p. 80, sec. 1.)

Persons suspected of crime may be apprehended in vacation and given a preliminary examination (W. sec. 77, p. 107.) So, no hardship or public inconvenience could result by the hiatus in the grand jury sessions from November 28, to the following May, in cases in the Circuit court, the grand jury in the District court was selected in January in fact under the new law and consisted of thirteen persons and was in regular session.

That the old act was repealed by necessary implication by the new act of November 28, 1892, we think admits of no question, and that the new act took immediate effect we think equally clear tested by all authorities on the subject.

Chief Justice Marshall in the celebrated case of Matthews *vs.* Zane, 7th Wheaton, 163, said that "a statute for the commencement of which no time is fixed takes effect from its date."

This rule of construction is approved by all of the text writers.

In U. S. *vs.* Tyner, 11 Wall, 88, it was held that "where two acts are not in express terms repugnant, yet if the latter act COVERS the WHOLE SUBJECT of the former, with new provi-

sions, it will operate as a repeal of the former act "see also—Norris *vs.* Crocker, 13 Howard, 429, Pana *vs.* Bowler, 107, U. S. 529, District of Columbia *vs.* Hutton, 143, U. S.. 18.

"If a subsequent statute be not repugnant in all of its provisions to a prior one, yet, if the latter statute clearly *intends to prescribe* the *only rule* which shall govern, it repeals the former one.

State *v.* Stoll, 17 Wal., 425.
Daviess *v.* Fairbarn, 3 How., 636.
U. S. *v.* Claflin, 97 U. S., 546.
Cook County Nat. Bk. *v.* ffi. S., 107 U. S., 445.

"Where two acts are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.

D. C. against Sutton, 143 U. S., 18.

Mr. Chief Justice Waite, speaking for the Court in King *vs.* Cornell *et al.*, 106 U. S., 395, says:

"While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the latter act *covers* the *whole* subject of the earlier, and embraces new provisions which plainly show that the last was intended as a substitute for the first, it will operate as a repeal."

Citing U. S. *vs.* Tynen, 11 Wall., 92.

The doctrine is well established that when a constitution provides for a grand jury, it must be held to mean a common law grand jury, of not less than twelve. The same has always been held in regard to the petit jury.

Bish. Cr. Prac., Sec. 897, Amr. and Eng. Ency. Law, 731.
Thomp. on Trials, Sec. 3.

The Fourteenth Amendment to the United States Constitution, adopted in 1868, provides as follows:

"No State shall deprive any person of life, liberty, or property without due process of law."

This provision is similar to one in the 29th chapter of Magna Charter, which in full is as follows:

"No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land, we will sell to no man, we will not deny or defer to any man either justice or right."

The words "Law of the Land" were expounded as synonomus with "due process of law" and to securing to the individual those fundamental rights of trial which previous usage had established.

Bishop on criminal procedure 1st. volume, chap. 12, sec. 145.

The 5th Amendment U. S. Cons. provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except, etc."

(Does not bind States, but does bind U. S. Territories.)

Mr. Bishop in his "Criminal Procedure" vol. 1, sec. 854, says: "At common law a grand jury must consist of not over thirty-three persons, and not under twelve. Cites (3 Chitty Crim. Law, 311, Rex. *v.* Marsh 1 Nev. and P. 187, 6

A and E, 236). And so it must consist either by force of the common law or by statutes, in many or most of the States."

(Note 4 Com. *v.* Wood, 2 Cushing, 149 (Riding *vs.* P.) State, 55 Ga., 501) 16,) but is nowhere over twenty-three or under twelve. (Note 5, United States *vs.* Reynolds, 1 Utah, 226, and again at 319, affirmed as to numbers necessary to constitute a jury in the Supreme Court of the Territory, fixing it at 15 members since the act of Congress commonly called Poland bill and existing territorial laws were passed.

In the People etc,. respondent *v.* Moroni Green, appellant, 1st Utah, 11.

"Held that the common law was in force in Utah, sec. 17 of the organic act of Utah Territory, approved September 9," 1850, extends the common law over the Territory of Utah and a grand jury empanelled for the district courts must consist of 23 persons."

"Poland Bill," approved June 23, 1874, section 4, provided for making a jury list once a year of 200 persons, from which grand and petit juries to be drawn, but does not fix numbers. Territorial court held that the act of the Territorial Legislature fixing 15 as the number in the absence of the Poland bill's fixing it, was the law in force for her courts, but not for United States courts. See page 11. (*Id.*)

"In actions in the Federal courts in the Indian Territory the rule of decisions in the absence of statutes, or of proof of the laws or customs prevailing in the Territory, is the common law, since it is the *lex fori*—Pyeat *vs.* Powell, 51 Federal Report, 551."

Mr. Bishop also says at sec. 855:

"We shall see that where the Constitution secures a trial

by petit jury, it must, to be a jury, consist of not less than twelve. Doubtless the like rule applies to a grand jury; so that if a statute should authorize a finding by less than twelve concurring jurors, it would be void, as to cases wherein the party is constitutionally entitled to be proceeded against by indictment."

1 Bish. Cr. Proc., sec. 855.

Mr. Justice Miller in delivering the opinion of the Court in *ex parte* Bain, 121, U. S., said: "In the case of the State *vs.* Sexton, 3 Hawks, Law and Equity, (N. C.) 184. The Supreme Court of that State said: "It is a familiar rule that the indictment should state that the defendant committed the offense on a specific day and year; but is unnecessary to prove, in any case, the precise day and year, except when the time enters into the nature of the offense. But if the indictment lay the offense to have been committed on an *impossible day* or on *a future day*, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the statutes of Jeofails, and cannot therefore be amended, being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found."

Mr. Blackstone in his Commentaries (Book 4, p. 306), says: "The time and place are also to be ascertained; by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, *provided* the *time* be *laid previous* to the *finding* of the *indictment*—"

From the above authorities it will be seen that the charging of the alleged offense to have been committed on a *future* day (Rec. pp. 4 and 5), rendered the so-called indictment a

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From the above authorities it will be seen that the charging of the alleged offense to have been committed on a *future* day (Rec. pp. 4 and 5), rendered the so-called indictment a

mere *nullity*, and had the jury been a legal body it would have conferred *no jurisdiction* on the Indian court over the cause, or the appellant.

The terms "presentment" and "indictment" are used in constitutional phraseology in their common law sense and necessarily presuppose the action of a grand jury.

Eason *vs.* State, 6 Eng. (Ark.), 481.

See 2 Story Const., sec. 1784.

The unconstitutionality of a law is a jurisdictional question.

Ex parte Siebold, 100 U. S., 371.

Ex parte Yarborough, 110 U. S., 651.

There can be no question of waiver here; the defendant's motion to quash the indictment fully sets out all the objections urged here.

See Record, p. 6.

The act of the Cherokee council was void, as opposed both to the Cherokee Constitution and the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States. These amendments apply to the Cherokees, as heretofore clearly shown.

In *ex parte* Frederich from the Circuit Court, District of Wash'n, North Dakota, August 9, 1892, Judge Handford held that "Where the Supreme Court of a State deeming the evidence insufficient to warrant a conviction of murder in the first degree reversed the judgment and directed that a judgment be entered adjudging the accused guilty of murder in the second degree. That this second judgment was void for it was the jury's province to determine the degree

of the crime, and the prisoner's confinement thereunder was without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, and although the judgment so entered was void, the accused was not entitled to be released by a Federal Court on *habeas corpus*, for the trial court had complete jurisdiction of the person and the crime, and he could appeal from the void judgment to the State Supreme Court, and there present the question involved, and if relief were then denied, he would be entitled to a writ of error from the Supreme Court of the United States, 51 Fed. Reporter, 747.

In the same case, upon appeal in this court (149 U. S. 70), Mr. Justice Jackson, delivering the opinion of the court said (at page 76), quoting Mr. Justice Bradley in *ex parte* Siebold, 100 U. S., 371–375, "The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other circumstance, rendering its proceedings void. This distinction between an erroneous judgment is well illustrated by the two cases of *ex parte* Lange, 18 Wall., 163, and *ex parte* Parks, 93 U. S., 18. In the former we held that the decision was void and released the prisoner accordingly; in the latter we held that the judgment, whether erroneous or not, was not void because the court had jurisdiction of the cause, and we refused to interfere. Mr. Justice Jackson, continuing, says "The reason of this rule lies in the fact that a *habeas corpus* proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should therefore be

limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction or by reason of the courts having exceeded its jurisdiction in the premises."

Continuing at page 77, he said:

"In *ex-parte* Royal, 117 U. S., 241, 252, 253, the Court, speaking by Mr. Justice Harlan, said:"

"That after a prisoner is convicted in the highest court of a State in which a conviction could be had, if such conviction was obtained in disregard or in violation of rights secured to him by the Constitution and laws of the United States, two remedies are open to him for relief in the Federal courts: He may either take his writ of error from this court under section 709, of the Revised Statutes of the United States, and have his case re-examined in that way on the question of whether the State court has denied him any right, privilege or immunity guaranteed him by the Constitution and laws of the United States; or he may apply for a writ of *habeas corpus* to be discharged from custody under such conviction on the ground that the State court had no jurisdiction of either his person or the offense charged against him, or had for some reason lost or exceeded its jurisdiction so as to render its verdict a nullity, in which latter proceeding the Federal courts could not review the actions or rulings of the State court which could be reviewed by this court upon a writ of error. After a final disposition of the highest State court, the Circuit Court may, in its discretion, put party who has been denied a right privilege or immunity claimed under the Constitution or laws of the United States to his writ of error from the court rather than interfere by writ of *habeas corpus*."

"We adhere to the views expressed in that case. It is

certainly the better practice, in cases of this kind, to 'put the prisoner to his remedy' by writ of error from this court, under section 709 of the Revised Statutes, than to award him a writ of *habeas corpus*, for under proceedings by writ of error the validity of the judgment against him can be called in question and the Federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the State authorities in a position to deal with him thereafter within the limits of proper authority, instead of discharging him by *habeas corpus* proceedings and thereby depriving the State of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged."

This court affirmed Judge Handford in requiring the prisoner to prosecute his case by writ of error without passing on constitutional questions raised and decided by him in the Circuit Court below.

In *ex parte* Siebold, Mr. Justice Bradley delivering the opinion of the court, said: "Where personal liberty is concerned the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ."

Id., note 1.

"The appellate jurisdiction of this court, exercisable by *habeas corpus* extends to a case for imprisonment upon conviction and sentence in an inferior court of the United States under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment by writ of error or not."

In *ex parte* Wilson, and *ex parte* Farley, 40th Federal Reporter, 66-7.

Judge Parker held that the grand jury empanelled by the U. S. Court at Muskogee, Indian Territory, was empanelled without authority of law and was an illegal body, and an indictment found by it would be simply a nullity.

Sylabus, sec. 7.

Id. Sylabus, sec. 8. Due process of law.

A person convicted and sentenced to imprisonment upon such an indictment would be illegally convicted and sentenced and is therefore constrained of his liberty without due process of law and contrary to the Constitution of the United States.

Sylabus, sec. 9. "When such facts are shown, the writ of *habeas corpus* becomes a "writ of right" and the court having power to issue can exercise no sound discretion against issuing it."

Of course a State may pro vide by its constitution for a prosecution without indictment. But that is not this case. The Cherokee Nation is not a State, and besides its constitution and statutes require an indictment in a prosecution for murder.

In *ex parte* Jefferson Wilson, 140 U. S., 575, 11 Sup. Ct. Rep., 870, this court inferentially held that a radical defect in the number of grand jurors, reducing the body below the number required to find an indictment, would destroy the jurisdiction of the court.

The same was held in a strong opinion in Lot *vs.* State, 18 Texas Ct. App., 629. "To find a bill there must at least twelve of the jury agree."

4 Black. Com , 306.

9 Am. & Eng. Ency Law 6.

In a case where the trial court has no jurisdiction, the circuit court will discharge the prisoner on *habeas corpus*.

In re Chapman, 156 U. S., 211.

Ex parte Belt, 159 U. S. —; 15 Sup. Ct. Rep., 987.

9 Am. & Eng. Enc. Law, p. 225.

The above cases show that the writ will be more readily granted where a trial has been had, and where no appeal or writ of error lies. This is such a case.

Until a grand jury had returned an indictment, there was no charge of subject-matter before the court for the action of the trial jury. In this case the Cherokee law required an affirmative vote of *seven* members of the grand jury to find an indictment. But this grand jury had only *five* members in all. If every member had voted for the bill it would still have lacked two of being the number required to find a bill. We may truthfully say there was *no indictment* in this case, for five men cannot find an indictment.

An indictment is essential to jurisdiction in a trial for murder, where the Constitution requires an indictment. This is most emphatically held and expressed in *ex parte* Bain, 121 U. S., 1. There the court ordered the prisoner discharged, and cited:

Ex parte Lang, 18 Wall., 163.

Ex parte Parks, 93 U. S., 18.

Ex parte Wilson, 114 U. S., 417.

Any person, whether a citizen or not, unlawfully restrained of his liberty, is entitled to the writ of *habeas corpus*.

Elk *vs.* Wilkins, 112 U. S., 108.

Case of Hottentot Venus, 13 East., 195.

Case of Dos Santon, 2 Brock., 493.

In re Kaine, 14 How., 103.

In the case of Ball Christie *vs.* Mayes, sheriff—heretofore mentioned—the United States Court for the Indian Territory by Judge Stuart, has had this precise question under consideration, and after a full review of the Cherokee laws and the authorities generally, discharged two prisoners indicted by a grand jury of five in the Indian Court. The record of that case is here upon appeal but Christie's death has abated it.

We think the above considerations establish : 1. That the so-called grand jury of five was an illegal body, both under the Constitution of the Cherokee Nation and that of the United States and without power of action. 2. That the so-called indictment was void and a nullity. 3. That the trial court was without jurisdiction to try said Talton ; and 4. That the petitioner is entitled to be discharged on *habeas corpus*

Respectfully submitted,

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In the Supreme Court of the United States.

Case No. ——. Term No. 227

BOB TALTON, - - - - - *Ex Parte*

Mayor &c. Sheriff.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

Brief for Appellee.

Wm McCracken,
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Attorneys for Appellee.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

Brief for appelle.

STATEMENT.

On the 3d day of November, 1892, in the town of Catoosa, in the Cooweescoowee District of the Cherokee Nation, the petitioner, Bob Talton, a Cherokee Indian, killed Jesse Elliot, another Cherokee Indian, by cutting his throat.

Afterward, on the 1st day of December following, he was, by a grand jury of the said district duly empaneled, regularly indicted, charged with the crime of murder.

At a special term of the Supreme Court of the Cherokee Nation, begun and held on the 26th day of December, 1892, Talton was arraigned upon said indictment, pleaded not guilty, a jury was empaneled and sworn, and, after a trial lasting several days, conducted in the usual and ordinary manner, was, on the 31st day of December, 1892, found guilty of murder as charged in the indictment.

Thereupon the Supreme Court of the Cherokee Nation passed judgment on said Talton, sentencing him to death, appointing February 28, 1893, as the date of his execution, and ordering his confinement in the interim in the jail of the Nation, situated at Tahlequah.

On the 15th day of February, 1893, Talton filed in the District Court of the United States for the Western District of Arkansas a petition for a writ of *habeas corpus*.

He set out in his petition as grounds for his discharge, that the indictment on which he was convicted was illegal and void in this: that it was found and returned by a grand jury consisting of only five members; whereas, he claimed that by the laws of the Cherokee Nation then in force, thirteen constituted the lawful grand jury.

On the 15th day of February, 1893, the district court aforesaid, through the Honorable Isaac C. Parker, the judge thereof, granted the prayer of said petition so far as to issue a writ of *habeas corpus*, directed to George W. Mayes, High Sheriff of the Cherokee Nation, commanding him to have the body of said Bob Talton, together with the cause of his restraint, before the said court on the 20th day of February, 1893,

On the date last named, the High Sheriff of the Cherokee Nation, in obedience to the command of said writ, produced the body of said Talton before the United States District Court aforesaid, and filed his return to said writ, in which he set forth that he restrained the body of the petitioner, Bob Talton, by virtue and authority of a certain warrant and order issued to him by John Wickliff, Supreme Judge of the Cherokee Nation, which was based upon a judgment duly rendered by the said supreme court, convicting the said Talton of murder, and filed therewith a transcript of the proceedings had in said case, as appeared of record in said supreme court.

The district court, upon examination into the cause of the restraint of Talton, and full investigation thereof, decided that the same was legal, and remanded him into the custody of the high sheriff of said Nation.

Talton thereupon sued out his writ of error.

The laws of the Cherokee Nation divide its judiciary into three branches, to-wit: the supreme, circuit and district courts.

The supreme court has exclusive original jurisdiction in all cases of manslaughter, and of all cases involving the punishment of death. (See *Compiled Laws of Cherokee Nation, sec. 148, p. 102.*)

The circuit courts are divided into three judicial circuits, known as the northern, middle and southern circuits.

The northern circuit is composed of Delaware, Cooweescoowee, Saline and Tahlequah districts.

Terms of the circuit court are held in the Cooweescoowee district commencing on the second Monday in May and September of each year. (*Compiled Laws of Cherokee Nation, secs. 150–152, p. 104.*)

The law relating to the grand jury, as it stood at the time of the indictment of Talton, and under which the grand jury was empaneled that found that indictment, is as follows:

"At least fourteen days before the commencement of the first regular term of the circuit and district courts in each year, the judges of both courts shall furnish the sheriff of each district a list of five names of persons, to be selected from the most intelligent, respectable and responsible citizens of the district, who shall be summoned to act as grand jurors for that district *during the year*, and to sit during the regular terms of the court respectively, unless sooner discharged by the court, and if required by the solicitor, for any other period not more than five days, and at or near the regular place of holding court, after the adjournment of said court." (*Sec. 61, p. 101, Cherokee Laws.*)

On the 28th day of November, 1892, the legislature of the Cherokee Nation passed the following law:

"At least fourteen days before the commencement of the first regular term of the circuit and district courts in each year, the judges of both courts shall each furnish to the sheriffs of each district a list of thirteen names of persons, intelligent, and who shall have attained the age of twenty-one years, and are otherwise qualified as jurymen, citizens of the district, who shall be summoned to act as grand jurors for that district during the year, and to sit during the regular terms of the court respectively, unless sooner discharged by the court; but whenever information of the commission of any felony within his district shall come to the knowledge of the solicitor at any time between the regular sessions of the grand jury and the

due execution of the law, shall, in his opinion, make it unsafe to await for their action at the regular session of the grand jury, but shall require an immediate investigation of the facts in the case with the view to prevent the escape from justice of any person strongly suspected, or to ascertain and fix the crime upon the guilty party, he shall be required to obtain summons from the district clerk, commanding the sheriff to summon the grand jury of the court, already authorized and empowered by law to take jurisdiction of such crimes, to meet at the court house in his district at as early a day as possible, to be fixed by the solicitor, for the purpose of an immediate investigation of such charges as the solicitor may prefer against any party before them; also the said solicitor will obtain summons for witnesses as in other cases made and provided for. Provided, that the solicitors shall not require the grand jury, as provided for in this section, to remain in session in the investigation of any one case more than five days." (*Compiled Laws of Cherokee Nation, 1892, sec. 181, p. 116.*)

The petitioner asks his discharge in this case for the reason, as he claims, that he was indicted by a grand jury composed of only five men, when the law in force at the time, as he contends, required a grand jury to be composed of not less than thirteen.

The contention of the Cherokee Nation is—

First. That the relation existing between the federal courts and the courts of the Nation, so far as jurisdiction to inquire into the validity of the proceedings of its courts is concerned, is the same as the relation between the federal courts and the courts of the different states of the Union.

Second. That the power of the federal courts to discharge upon a writ of *habeas corpus* a person convicted in the Chero-

kee courts can only be exercised where the trial court has exceeded its jurisdiction.

Third. That the question involved in the petitioner's claim is one of error and irregularity merely, and not jurisdictional.

BRIEF AND ARGUMENT.

I.

It is admitted that the crime with which the petitioner was charged was committed within the territorial jurisdiction of the Supreme Court of the Cherokee Nation, which tried him, and that the petitioner and Jesse Elliot, whom he is convicted of killing, were both Cherokee Indians, and that that court had sole jurisdiction of an offence committed by the petitioner upon the person of the deceased, Jesse Elliot. And, upon this state of case, the Cherokee Nation contends that the District Court of the United States for the Western District of Arkansas had no power to inquire into the alleged error or irregularity in the formation of the grand jury which indicted the petitioner; and this contention is, we think, abundantly supported by authority. Legally speaking, the Cherokee Nation is neither a state nor a territory, within the ordinary meaning of those terms; yet, in many respects it bears a close analogy to the condition of a state in the Union and possesses and exercises many of its sovereign powers and attributes.

If, as a matter of fact, it possesses the power of self-government, the right to enact and enforce its own laws for the protection and government of its own citizens, it would, un-

doubtedly, so far as interference with its judgments by the federal courts are concerned, occupy the same plane as a state, be entitled to the same exemption and enjoy the same immunity therefrom.

That it does possess this right of self-government, and in that respect, at least, bears toward the government of the United States the relation borne by a sovereign state thereof, is a proposition that admits of no doubt.

In the celebrated case of *The Cherokee Nation against the State of Georgia, 5 Pet. (U. S.), 14,* that great jurist, Chief Justice Marshall, defining the relation borne by the Cherokee Nation to the states of the Union, used this language:

"So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political community, separated from others, capable of managing its own affairs and governing itself has, in the opinion of the majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relation of peace and war, of being responsible in their political character for any violation of their engagements or for any aggressions committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts."

In the case of *Worcester vs. the State of Georgia, 6 Pet. (U. S.), 515,* which arose from an attempt upon the part of that state to put certain of her laws in force in the Cherokee Nation, this same learned judge delivered an opinion vigor-

ously denying the right of Georgia to impose her laws upon the Cherokees, and in no uncertain language upheld their right to self-government as an independent political community.

"The very fact," says he, in the course of his opinion, "of repeated treaties with them recognize it, and the settled doctrine of the law of nations is that a weaker power does not surrender its independence, its right to self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of self-government and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states so long as self-government and sovereign and independent authority are left.'"

In this same case, Mr. Justice McLean, concurring with the Chief Justice, said:

"It must be admitted that the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the Supreme Court of the United States, and yet, having the right of self-government, they in some sense form a state. In the management of their internal concerns they are dependent on no power. They punish offenses under their own laws, *and in doing so they are responsible to no earthly tribunal.* By various treaties the Cherokees have placed themselves under the protection of the United States. They have agreed to trade with no other people, nor invoke the protectection of any other sovereign. But such engagements do not divest them of the right of self-government."

By the treaty of 1835, known as the Treaty of New Echota, made between the United States and the Cherokee Nation, the United States guaranteed to the Cherokees mov-

ing west of the Mississippi a home where "they can establish "and enjoy a government of their own choice, and perpetuate "such a state of society as may be most consonant with their "views, habits and conditions, and that the lands ceded to the "Cherokee Nation shall in no future time, without their con- "sent, be included within the territorial limits or jurisdiction of "any state or territory. But they secure to the Cherokee Na- "tion the right of their national councils to make and carry "into effect all such laws as they may deem necessary for the "government and protection of the persons and property within "their own country, belonging to their people, or such persons "as have connected themselves with them: provided always, "that they shall not be inconsistent with the Constitution of "the United States, and such acts of Congress as have been or "may be passed regulating trade and intercourse with the "Indians."

This guarantee of self-government given to the Cherokee Nation by the United States under this treaty was re-affirmed in the treaty of 1866 (see *14 U. S. Statutes, Art. 8, p. 803*), in these words:

"That the judicial tribunals of the Cherokee Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country, in which members of the Nation, by nativity or adoption, shall be the only parties or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty."

At all times and under all circumstances, in every treaty or compact entered into with the United States, the Cherokee Nation has guarded with jealous vigilance the right of self-

government. It has always been asserted, acted upon and maintained by it, and in no instance has the United States, either through its judiciary or by act of Congress, sought or attempted to withold this right from the Cherokees.

On the contrary, upon every occasion, when dealing with question, Congress has unhesitatingly recognized and acknowledged the exclusive right of the Cherokee Nation to make and enforce its own laws, and generally regulate its own domestic affairs.

In conferring upon the federal courts jurisdiction over crimes committed in the Indian country, it provided that this jurisdiction "shall not be construed to extend to crimes com-"mitted by one Indian against the person or property of an-"other Indian. Nor to any Indian committing any offense in "the Indian country, who has been punished by the local laws "of the tribe, nor to any case where by treaty stipulations the "exclusive jurisdiction over such offense is, or may be, secured "to the Indian tribes respectively." (See *Sec. 2146, Revised Stat. U. S.*)

The act of Congress of March 3d, 1871 (see *sec. 3079, Rev. Stat. U. S.*), while it changed the policy of the government in its dealings with the Indians, so far as to prohibit further contract with them by treaty, fully recognized the irrevocable and binding nature of the treaties already in existence by placing the following proviso therein, to-wit:

"But no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe, prior to March 3d, 1871, shall be hereby invalidated or impaired."

And in the recent act of Congress of May 2, 1890, extending the Constitution and General Laws of the United States over the Indian Territory, it is enacted that they "shall "have the same force and effect in the Indian Territory as elsewhere in the United States, but nothing in this act shall be "so construed as to deprive any of the courts of the civilized "nations of exclusive jurisdiction over all cases arising wherein "members of said Nation, whether by treaty, blood or adoption, "are the sole parties. Nor so as to interfere with the right and "power of said civilized nations to punish said members for "violation of the statutes and laws enacted by their national "councils, when such laws are not contrary to the treaties and "laws of the United States." (See *Supplement of Revised Stat.*, p. 729.)

It is indisputable that the effect of the treaties between the United States and the Cherokee Nation and of the foregoing acts of Congress is to give to that nation the right to enact laws for the government and protection of its people, and the exclusive right to enforce same by means of such courts or tribunals as it may establish.

The ~~highest~~ court of ~~the United States~~ has declared time and again that the solemn pledges of self-government contained in its treaties with the civilized tribes effectually debar the federal courts from exercising jurisdiction over controversies arising among their own citizens.

United States vs. Rogers, 4 How. (U. S.), 567.
United States vs. Cox, 18 How. (U. S.), 100.

United States vs. Kagama, 118 U. S., 375.

Ex parte Mayfield, 141 U. S., 107.

United States vs. Famous Smith, decided Jan. 3, 1894.
151 US. 50

In the case of the *United States vs. Cox* cited above, Mr. Justice McLean, delivering the opinion of the court, said:

"The Cherokees are governed by their own laws. As a people they are more advanced in civilization than the other Indian tribes with the exception, perhaps, of the Choctaws. By the national council their laws are enacted, approved by their executive, and carried into effect through an organized judiciary. * * * This organization is not only under the sanction of the general government, but it guarantees their independence, subject to the restriction that their laws shall be consistent with the Constitution of the United States and acts of Congress which regulate trade and intercourse with the Indians. * * * In some respects they bear the same relation to the federal government as a territory did in its second grade of government under the ordinance of 1787. Such territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and acts of Congress. The principal difference consists in the fact that the Cherokees enact their own laws under the restrictions stated, appoint their own officers and pay their own expenses. This is, however, no reason why the laws and proceedings of the Cherokee Nation, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories of the Union."

The petitioner then—if we are correct in our deductions from the foregoing authorities—stands before this court to be tried just as if he were asking a writ of *habeas corpus* to be relieved from a conviction of a state court; and, the Honorable District Court of the United States for the Western District of

Arkansas had no more power or authority to inquire into the regularity of the proceedings and conviction in his case than it would have if he were asking to be relieved from the judgment of conviction in a state court.

The ~~Supreme~~ Court ~~of the United States~~ has frequently decided that the fifth and sixth amendments of the Federal Constitution are designed exclusively as restrictions upon federal power and federal tribunals.

Barron vs. Baltimore, 7 Pet. (U. S.), 243.
Twitchell vs. Pennsylvania, 7 Wall. (U. S.), 321.
Withers vs. Buckley, 20 How. (U. S.), 95.

And that article seven of said amendments, relating to trials by jury applies only to the courts of the United States.

Pearson vs. Yewdall, 95 U. S., 294.
Edward vs. Elliott, 21 Wall. (U. S.), 558.

The theory upon which these amendments are held not to apply to the states is founded upon the proposition that each state when it entered into and became a member of the Union reserved to itself the right of local self government; the right to make a constitution for itself and to enact such laws as it might deem necessary for the regulation of its own internal concerns. And these amendments were made a part of the federal constitution, not for the purpose of serving as checks upon the state, but to guard against apprehended encroachment upon the part of the general government.

The Cherokee Nation in accepting the protection of the United States, through and under its treaties with this government, assumed the same relation to the federal constitution, so far as same affects her rights of local self-government, as did each of the states in becoming a part of the Union. The states reserved this right of self-government at the time they entered into and formed the compact of Union. The Cherokee Nation reserved it when she entered into the compact of treaty with the United States and agreed to accept its protection.

She became a part of the Union with as clearly a recognized and acknowledged reservation of the right of local self-government as did each of the states when they entered into and became a part of it, and in accepting the protection of the United States and acknowledging the supremacy of its constitution, she bound herself to the same extent that the other political communities with reservations of self-government are bound.

If this is the relation borne by the Cherokee Nation to the constitution of the United States, so far as same affects her right to self-government, then the fourteenth amendment which provides, "nor shall any state deprive any person of life, liberty or property without due process of law" applies to it with any other or greater force and effect than it applies to a state.

Petitioner claims that he has been convicted without that due process of law required by this last named provision of the constitution.

Mr. Justice Cooley, in his work on Constitutional Limitations, page 153, in defining the meaning of these words, says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case, 'by the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'"

The words "due process of law" in the fourteenth amendment to the Constitution do not necessarily require an indictment by a grand jury in a prosecution by a state for murder.

Hurtado vs. California, 110 U. S., 516.
Rowan vs. State, 30 Wis., 144.
Parker vs. People, 21 Pacific Rep., 1120.

Mr. Justice Matthews, delivering the opinion of the court in the case of *Hurtado vs. California, supra*, thus construes the words "due process of law," as used in the fourteenth amendment:

"It refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure. 'The fourteenth amendment,' as was said by Mr. Justice Bradley in the case of the *State of Missouri vs. Lewis, 101 U. S., 22*, 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversity in these

respects may exist in two states, separated only by an imaginary line; on the one side of this line there may be the right of trial by jury, and on the other side no such right. Each state prescribes its own mode of judicial proceeding.' * * * * It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good which regards and preserves these principles, must be held to be due process of law."

Nor does this amendment require that the indictment shall be found and presented by a grand jury formed as at common law.

Parker vs. People, 21 Pacific Rep., 1120.
State vs. Ah Jim, 23 Pacific R., 76.
People vs. Waters, 1 Idaho, 560.

In the case of *Parker vs. People*, cited above, the Supreme Court of Colorado, deciding this question, said:

"It is claimed that the words, 'due process of law' as used in the fourteenth amendment of the Federal Constitution necessarily require an indictment by a grand jury in all prosecutions for felonies by a grand jury formed as at common law and that the portion of our state constitution providing for an indictment by a lesser number is in conflict therewith. The court in this country has spoken upon this question and its decision is against the argument now advanced. In the case of *Hurtado vs. California* the authority of a state to authorize prosecutions for felonies by information without indictment by a grand jury is expressly upheld and therefore the state may modify the system between the two extremes."

In the case of *Ah Jim, ante*, a grand jury composed of seven members provided for by the laws of Montana was held

not to be in conflict with this provision of the Constitution, and the same ruling was sustained in the case of *People vs. Waters, 1 Idaho 560,* upholding the Idaho act, providing for a grand jury of seven members.

It is evident that the Cherokee Nation by its constitution and laws secures to its citizens that due process of law demanded by this amendment.

By section eleven, article five, of its constitution, it guarantees the accused "the right of being heard, of demanding "the nature and cause of the accusation; of meeting the wit- "nesses face to face, of having compulsory process for obtain- "ing witnesses in his favor and in prosecutions by indictment "or information a speedy public trial by an impartial jury of "the vicinage." Each and all of which are put in force by appropriate acts of its legislature.

It divides its judiciary into three separate and distinct courts, and to each of them assigns jurisdiction commensurate with its dignity and importance. Upon its highest and ablest tribunal, the supreme court of the nation, it confers exclusive jurisdiction over murder, manslaughter and crimes the punishment for which is death. It provides by acts of its council for empaneling grand juries and presentment by them of indictments as the foundation of prosecution of criminal offences and in all respects secures to the accused those opportunities to establish his innocence, and surrounds him with those safeguards against unjust conviction, provided and furnished by other enlightened and civilized governments.

The "process of law" by which the petitioner, Bob Talton, was brought to the point of paying the penalty for his crime was of this character. It was the "process of law" of his land, applicable alike to all Cherokees in that land. Every right accorded to a criminal by the laws of civilized communities was given him in this case. He was notified of the nature and cause of the accusation against him by an indictment that in apt and appropriate words charged him with the crime of murder, committed in killing Jesse Elliot.,

He was given compulsory process for his witnesses, a speedy public trial by an impartial jury of the vicinage, was brought face to face with the accusative witnesses, and in an investigation lasting several days, was afforded full and ample opportunity to be heard by himself and counsel.

Undoubtedly, the rights guaranteed by the fourteenth amendment of the Constitution of the United States were fully preserved to him in this trial. In the words of Mr. Webster, in the Dartmouth College case, *ante*, he was tried by a law "which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

II.

If the preceding view of the relation borne by the Cherokee Nation to the Constitution and laws of the United States so far as involves her right of local self-government be correct, the courts of the United States would have no right to interfere with the final judgments of her tribunals, unless it be made to appear that jurisdiction over the person or crime was want-

ing; or, that having the requisite jurisdiction, her courts have exceeded their power in the infliction of the punishment.

Church, in his work on *Habeas Corpus*, says:

"It has been said by a thousand courts and a thousand judges that alleged errors and irregularities behind the judgment cannot be inquired into on *habeas corpus*; and that the writ of *habeas corpus* was never designed to be a writ of error, by which errors or irregularities of final judgments could be reversed. It deals with more radical defects which go to the jurisdiction of the court or officer, and which render the proceeding or judgment void."

In the case of *Ex Parte Ulrich, 43 Fed. Rep., 663*, the Hon. Henry C. Caldwell, of the Circuit Court of Appeals for the Eighth Circuit, has virtually decided this case in the following language:

"Assuming the truth of the allegations in the petition, the first question to be determined is whether the district court had jurisdiction, by a writ of *habeas corpus*, to declare the judgment of the state court a nullity, and discharge the petitioner from the imprisonment imposed by it. The district courts of the United States do not possess any supervisory or appellate jurisdiction over the criminal courts of a state. Nor can the writ of *habeas corpus* be made to perform the office of a writ of error or appeal. Errors in law, however numerous, can only be reviewed by appeal or writ of error in the court exercising supervisory or appellate jurisdiction over the trial court in the particular case. It is only where the trial court is without jurisdiction of the person or the cause, and a party is subjected to illegal imprisonment in consequence, that the writ of *habeas corpus* may be invoked, and the party discharged from the illegal imprisonment."

In the case of *Ex parte Watkins, 3 Pet. U. S., 193*, Chief Justice Marshall, delivering the opinion of the court, lays down

the doctrine that the final judgments of courts having general jurisdiction over the person and the crime cannot be reviewed in a *habeas corpus* proceeding.

"Can the court, upon this writ," says he, "look beyond the judgment and re-examine the charges upon which it was rendered? The judgment in its nature concluded the subject on which it is rendered and pronounces the law of the case. The judgment of a court of record where jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on the other courts. It puts an end to inquiry concerning the facts by deciding it. The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced, but they deny their application to a case in which the indictment charges an offense not punishable criminally according to the law of the land. But with what propriety can this court look into the indictment? We have no power to examine the proceedings on a writ of error, and it would be strange if, under cover of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

The principles set forth in the foregoing opinion have been affirmed in repeated decisions of the Supreme Court.

In *Ex parte Parks, 93 U. S., 18*, the court said:

"But, if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error."

In *Ex parte Reed, 100 U. S., p. 13*, the Supreme Court says:

"A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the petitioner, the sentence under which he is held must be not merely erroneous and voidable, but absolutely void."

In the case of *Ex parte Yarborough, 110 U. S., p. 651*, the court says:

"It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of *habeas corpus* into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court had jurisdiction of the party and of the offense for which he was tried and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further. * * *"

"Its decision as to the conformity of the indictment to the provisions of the statute may be erroneous, but if so it is an error of law made by a court acting within its jurisdiction, which could be corrected on a writ of error, if such writ was allowed, but which cannot be looked into on a writ of *habeas corpus* limited to an inquiry into the existence of jurisdiction on the part of that court."

In *Ex parte Frederick, 149 U. S., p. 70*, the court, speaking of the distinction between erroneous and void judgments, referred to the cases of *Ex parte Lange, 85 U. S.*, where the judgment was held to be void and the prisoner released, and *Ex parte Parks, 93 U.S.*, where the judgment was held not void though erroneous, and the court refusing to interfere, stated:

"The reason of this rule lies in the fact that a *habeas corpus* proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jur-

isdiction, or by reason of the court's having exceeded its jurisdiction in the premises."

In *In re Swan, 150 U. S. 637,* Chief Justice Fuller delivering the opinion of the court, said:

"We reiterate what has so often been said before, that the writ of *habeas corpus* cannot be used to perform the office of a writ of error or appeal.

"It is insisted that the circuit court was in error in the views it entertained and the conclusion reached in accordance therewith. But this objection is of error merely, and does not go to the power of the court in the premises. Judgments of courts, whether federal or state, cannot be treated as void and attacked collaterally on *habeas corpus*, even if error has actually supervened."

It is admitted that the crime was committed within the limits of the Cherokee Nation. That the petitioner Talton, and the man he killed, Jesse Elliot, were both Indians and citizens of the Cherokee Nation, and that the supreme court thereof had jurisdiction over this class of crimes.

But, it is insisted, that the court acquired no jurisdiction over the person of petitioner, for the reason that the grand jury that found the indictment was an illegal body, and that their acts in consequence thereof were nullities.

The learned judge before whom this case was tried below took the position that he had the power to go behind the indictment upon which petitioner was tried and convicted, and inquire into the legality of the grand jury that returned same, and for that purpose to pass upon and construe the laws of the Cherokee Nation relating thereto.

This position was taken by the learned court, not upon any theory of possessing appellate jurisdiction over the judg-

ments of the Cherokee courts, but upon the proposition that before the supreme court of the Cherokee Nation acquired jurisdiction over the person of Talton so far as to have the right to proceed to try him, an indictment must have been presented by a grand jury authorized by its laws; that, although there was an indictment in this case regular upon its face, yet, if in fact, the law of the Cherokee Nation then in force required that a legal grand jury should consist of thirteen persons, and the indictment was found and presented by a grand jury of five persons only, the same would be a nullity, would confer no jurisdiction upon the supreme court to try the petitioner, and would entitle him to a discharge from proceedings had thereunder.

This is one of the questions for the trial court.

Would not this ruling have the effect of setting aside the right of self-government guaranteed in the treaties between the United States and the Cherokee Nation, and of nullifying the acts of Congress affirming this right? Of giving to the federal courts, indirectly, appellate jurisdiction over controversies arising between citizens of the Cherokee Nation, exclusive jurisdiction over which, in the most binding and obligatory manner has been acknowledged by the United States, to exist solely in the courts of that nation? Certainly, this result would be inevitable. Concede the authority claimed, establish the precedent that the courts of the United States can, upon *habeas corpus*, supervise, set aside, reverse or annul the judgments of the Cherokee courts in matters affecting the construction of their own local laws, and a deadly blow will have been

struck at their right of local self-government; this great right that the United States has solemly pledged shall be preserved to them, that will leave it but a name shorn of all substance.

This doctrine, carried to its logical results, would authorize the district courts of the United States to convert the writ of *habeas corpus* into a writ of error or appeal for the purpose of reviewing and reversing judgments of courts of general jurisdiction of all the states in such cases. This, we have seen, is condemned by the numerous decisions of the supreme court. But we are not without authority, either in the text books or decisions of the highest courts of the land, upon the immediate question involved in the consideration of the indictment against Talton.

Church, in his work on *Habeas Corpus*, denying the right of the court to inquire into these matters in this proceeding, by *habeas corpus*, on page 319, section 250, says:

"Upon proceedings upon *habeas corpus* a court is not authorized to, nor will it inquire into the question of fact as to whether or not an indictment, regular upon its face, was ever found by the grand jury. This is an informality or irregularity merely, which may be corrected by other processes known to the law. Neither will the illegality of a grand jury that found the verdict be considered by such proceedings."

If the indictment is regular on its faee, the objection that it was not found by a legal grand jury will not be considered.

State vs. Henderson, La. Am., 82.
Ex parte Twohig, 13 Nevada, 302.
Ex parte Carll, 106 U. S., 288 and note.

By several decisions the Supreme Court of the United States has, in positive and unmistakable language, decided that the federal courts have no power to inquire into the formation of the grand jury with a view of determining its legality where no federal question is involved, and the effect of sueh inquiry would be to attack the judgments of courts of general jurisdiction other than federal courts.

Wood vs. Bush, 140 U. S., 278.
Jugiro vs. Brush, 140 U. S., 291.
Ex parte Jefferson Wilson, 140 U. S., 575.

In *Ex parte Harding, 120 U. S., 782,* Chief Justice Waite said, in delivering the opinion :

"This court has no jurisdiction for the discharge on *habeas corpus* of a person imprisoned under a sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under that sentence. The fact that a law of the territory allowed an alien, who had declared his intention of becoming a citizen of the United States, to sit on a grand jury, and that an alien did, in fact, sit on the jury that found the indictment against the petitioner, did not deprive the court of its jurisdiction for his trial under the indictment. The objection, if it be one, goes only to the regularity of the proceedings, not to the jurisdiction of the court."

The case of *ex parte Coy, 127 U. S., 731,* was a proceeding by *habeas corpus* for relief against a conviction in the Circuit Court of the United States for the district of Indiana upon an indictment charging a conspiracy to induce certain election officers to omit their duty relating to the return of poll books, etc. Petitioner claimed that the indictment charged no offense

known to the law, and that the court and grand jury had no jurisdiction in the premises. Mr. Justice Miller, in rendering the opinion said:

"We are less inclined to enter into these controversies as to a narrow construction of the statutes of Indiana and acts of Congress because we think they were questions properly before the district court on the trial of the prisoners. They were questions of which that court had jurisdiction, and which it was its duty to decide. When decided by that court they were not subject to review here by a writ of error, nor were they in a proper and just sense questions affecting its jurisdiction. It would be as well to say that every question concerning the sufficiency and validity of an indictment and the evidence necessary to support it, was a matter of jurisdiction, and authorized an interference if error took place, by writ of *habeas corpus* for its correction. That this cannot be done has been repeatedly held in this court."

The cases of *Wood vs. Brush, and Jugiro vs. Brush, 140 U. S., pp. 278–291*, have definitely settled adversely to petitioner the point upon which he claims to be entitled to his discharge in this proceeding. In the first named of these two cases, Mr. Justice Harlan, in the course of the opinion which he delivered, said:

"Whether the grand jury who found the indictment and the petit jury who tried the appellant, were or were not selected in conformity with the laws of New York—which laws we have seen are not obnoxious to the objection that they discriminate against citizens of the African race because of their race—was a question which the trial court was entirely competent to decide, and its determination could not be reviewed by the circuit court of the United States upon a writ of *habeas corpus* without making that writ serve the purpose of a writ of error. No such authority is given to the circuit courts of the

United States by the statutes defining and regulating their jurisdiction."

The case, however, of *ex parte Jefferson Wilson*, 140 *U. S.*, *575*, puts at rest any and all doubt that might exist as to the right of the federal court to go behind the indictment in this proceeding and pass upon the question of whether or not the supreme court of the Cherokee Nation placed the proper conitruction upon the acts of the legislature relating to grand juries, in holding that the grand jury presenting the indictment, which was composed of five persons only, was a legal grand jury. The facts in this case are almost identical with the case at bar. In this case of Wilson's the main point relied upon by petitioner was that the grand jury which had indicted him was not a legally constituted body, in that it was only composed of fifteen persons, while by an act of the legislature of the territory of Arizona, passed a day before that upon which the crime is charged to have been committed, it was provided that grand juries should be composed of not less than 17 nor more than 23 persons. The response to this was that no such act was passed, and if it had been put in force the defect in the number of grand jurors did not vitiate the entire proceedings so that the judgment could not be challenged collaterally on *habeas corpus*, but was at best only a matter of error.

It appeared that this supposed act was not contained in the official volume certified by the secretary of the territory. Petitioner claimed, however, that it had passed both houses of the assembly and was properly certified and placed in the hands of the governor; that, not being acted on by him, it became a law after the expiration of ten days.

On behalf of the territory, it was contended that the session of the legislature was limited to sixty days, and that this time had expired and the existence of the legislature legally terminated before the act could have become a law.

Mr. Justice Brewer delivered the opinion in this case. After setting out the facts, the substance of which is briefly given above, he said:

"This presents an interesting question of statutory construction, one into which, however, we deem it unnecessary to enter. As it is a question if it had been duly presented to the district court, a court having jurisdiction over the offense and the prisoner, and by it erroneously decided, can it be that such erroneous decision would have vitiated the proceedings and rendered void the sentence thereafter rendered? We think not."

Referring to the cases of *ex parte Coy, 127 U.S., 731, Wood vs. Brush, and Jugiro vs. Brush,* 140 *U. S.*, 278–291, cited *ante*, Mr. Justice Brewer further said in the course of his opinion:

"As the question whether the grand jury should be constituted of fifteen or seventeen members was a matter which must necessarily be considered and determined by the trial court, its rulings, however erroneous, would seem within the above authorities to present simply a matter of error and not be sufficient to oust the jurisdiction."

Clearly, this declaration of the power of the courts on proceeding by *habeas corpus* is decisive of the question involved in the case under consideration.

The petitioner claims that the indictment is void because the grand jury that composed it should have consisted of thirteen persons, when in fact there were only five.

The determination of that question involves the construction of the Cherokee laws alone.

Its supreme court, the court of last resort therein, placed its construction upon these laws when it overruled petitioner's demurrer to the indictment and held that the same was valid. The courts of the United States have no power to interfere with this judgment if the alleged error arises solely from the construction of these Cherokee laws.

Elmendorf vs. Taylor, 10 *Wheat* (*U. S.*), 159.
Bank of Cincinnati vs. Buckingham, 5 *How.* (*U.S.*), 317.
Adams vs. Preston, 22 *How.* (*U. S.*), 473.

In the case of *Bank of Cincinnati vs. Buckingham*, cited above, Mr. Justice Green thus plainly and forcibly lays down the law applying to this principle:

"If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statutes of Ohio are repugnant to the Constition of the United States, but whether the supreme court of Ohio has erred in its construction of them. It is the peculiar province of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligations of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

And, certainly, having guaranteed to the Cherokee Nation the exclusive right to enact its own laws for the government of its people, and having guaranteed that its judicial tribunals

should retain exclusive jurisdiction in all civil and criminal cases arising within the Cherokee country between its own citizens, it is the peculiar province of the tribunals established under this guarantee to pass upon and construe their own statutes, and it is no part of the functions of this court, or other federal tribunals, to review their decisions or assume jurisdiction over them on the pretense that they have placed a wrong construction upon the acts of their national council providing for the organization of the grand jury.

That line of decisions of the supreme court relied upon as giving the federal courts authority to investigate the legality of the grand jury that found and presented this indictment, will not bear the wide construction that is sought to be placed on them.

The leading cases put forward for this purpose are *ex parte Bain, 121 U. S., 1; ex parte Wilson, 114 U. S., 418, and ex parte Lange, 85 U. S., 163.*

The judgments and proceedings in each of these cases, sought to be avoided or set aside on the proceeding by *habeas corpus*, were those of federal courts, and the grounds for interfering and relieving the petitioners were that the lower courts had either exceeded their power or had denied a right provided for by the 5th amendment of the Constitution.

Delivering the opinion in *ex parte Bain, ante*, Mr. Justice Miller denied the right of the lower court to try the prisoner without a valid indictment had been presented against him.

"If," says he, "there is nothing before the court which the prisoner, in the language of the Constitution, can be held

to answer, he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned."

But this was a prosecution in a federal court, upon which the 5th amendment of the Constitution, providing "that no "person shall he held for a capital or otherwise infamous crime "unless on a presentment and indictment of a grand jury," had full and direct bearing. And in deciding upon the validity of the indictment the court was construing a constitutional provision and dealing with a question involving federal matters alone.

The court ~~supreme tribunal of the United States~~ was doing in none of these cases what petitioner is asking shall be done in this case, namely: Wresting from the courts of a political community enjoying self-government under a valid and binding treaty, the right of construing the statutes of its own legislature in controversies arising between and affecting its own people only. *

III.

But, if we should be found in error in this position, and the court should decide to inquire into the regularity or irregularity, of the indictment against Talton, then, our contention is, that the act of the Cherokee Council, passed the 28th day of November, 1892, did not, and could not, go immediately into effect, and was not intended to go immediately into effect by the legislative council of the Cherokee Nation; and this act is to be construed as all others, with a view of ascertaining the legislative intent.

* Walker v. Swarout 92 U.S. 90, is conclusive on the two points presented above; under that decision the power to fix a jury or not and to fix its number, recognized in the local governments, and the

It will be observed that by section 61, page 101, of the Cherokee laws, heretofore cited, the grand jurors — five in number, as the law then provided — were to be selected at least fourteen days before the commencement of the first regular term of the circuit and district courts in each year, by the judges of said courts, and these grand jurors were, in the language of that law, "to act as grand juors for that district *during the year.*"

The law of November 28, 1892, also provided that at least fourteen days before the commencement of the first regular term of the circuit and district courts in each year, the judges of both courts shall each furnish to the sheriffs of each district a list of thirteen names of persons to be grand jurors, and these persons are to act as GRAND JURORS DURING THE YEAR.

The power of the judges to make this selection was "at least fourteen days before the commencement of the first regular term of the circuit and district courts in each year, and at no other term." This date had long passed before the 28th day of November, 1892, for that year, and there could possibly be no selection of grand jurors in accordance with the law until the spring of 1893. The first regular term of the Circuit Court of the Cooweescoowee district, according to the law then in force, was to be held on the second Monday in May. Of course, the legislative council of the Cherokee Nation knew that there could be no selection of grand jurors under the law which they were passing on the 28th of November, 1892, until the spring following. If the law authorizing five jurors was repealed and the new law im-

mediately went into effect by the operation of this act, then there would be a period between the 28th of November, 1892, and middle of May, 1893, when there could be no grand jury convened by the solicitors as provided by law. Both the old law and the act of November 28, 1892, provided for the selection of jurors at the first regular term of the circuit court in each year. The grand jury that returned the bill against Talton had been empanelled at the May term, 1892, of the circuit court for the Cooweescoowee district, and according to law continued to act throughout the ensuing year, not only at the regular terms in May and September, but whenever called upon by the solicitor. Under neither of these acts could a new grand jury be empanelled authorized to investigate crimes like that charged against Talton, except at the May term of the court, that being the first term of the year.

At the time of the passage of this last named act changing the number of grand jurors from five to thirteen, the council of the Cherokee Nation also passed an act relating to the petit jury, providing that a panel thereof should be composed of twelve members instead of six, as the law then stood. It was specially provided in this petit jury act that it should repeal the existing act relating to petit juries, and the construction placed upon this act by the courts of the Cherokee Nation was that it went into effect immediately upon its passage.

But the grand jury act of November 28, 1892, contains no words of repeal, nor words stating in express terms when it shall go into effect. A grand jury could not legally be empanelled under it. authorized to investigate charges of murder

in the Cooweescoowee district, prior to the May term of 1893 of said district.

This is not the case with regard to the petit jury act. This act could go into effect immediately, so that the trial juries could be empanelled in conformity with its provisions from the date of its passage.

It seems strange, if it was the intention of the legislative council, that both of these acts should go into effect from the date of their passage, that only one of them contained a repealing clause, and when the petit jury act, which could go into effect at once without interfering with the administration of justice, was made to repeal the existing law, that no words of repeal are found in the grand jury act.

If the act of November 28, 1892, operated as an immediate repeal of the pre-existing law, it could only do so by implication, and this kind of repeal is disfavored by law.

Red Rock vs. Henry, 106 U. S., 596.
McCool vs. Smith, 1 Black, U. S., 459.
United States vs. Packages of Dry Goods, 17 How., U. S., 87.
United States vs. Hopkins, 22 How., 299.
Endlich on Interpretation of Statutes, 280.
Ex parte Crow Dog, 109 U.S. 556.

In the case of *Red Rock vs. Henry*, above cited, Mr. Justice Woods, after citing authorities to the effect that repeals by implication are not favored, says:

"The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal the

prior law, it does not repeal it, unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground of the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

If both of the acts can stand, the theory of repeal by implication will be rejected, because that character of repeal is not favored by the law, and is only adopted where there is no other alternative. It is manifest that these two grand jury acts could both stand without conflict until the May term, 1893, of the circuit court of the Cooweescoowee district, and that the act of November 28, 1892, did not cover the whole ground occupied by the former act is equally clear, when it is remembered that by this last act no grand jury could be empanelled prior to May, 1893. The act of November 28, 1892, was impossible of execution until the second Monday in May, 1893. No step could be taken under that act for the formation of a grand jury prior to that time, and since it was impossible for a grand jury to be empanelled under that act prior to May, 1893, we think it is only fair to conclude that the legislature of the Cherokee Nation intended what necessarily followed from its language and tenor, and that during this time the law which they did not repeal in express terms should be continued in force in order to secure a due enforcement of the law.

Under the Cherokee law, the judges of these circuit and district courts can call special terms for the trial of capital offenses, as they did in the Talton case; and, under the old law, they had to rely upon the regular grand jury empanelled for the year, which was subject to the call of the solicitor whenever

the circuit or district court might see proper to call a special session. Under the new law, since no grand jury could be empanelled pefore the second Monday in May, 1883, the construction given by the petitioner, if the new law immediately repealed the old, would preclude the circuit and district courts from holding a session of their courts prior to the second Monday of May, 1893, for the examination of capital or other crimes, as they could have no grand jury until that time.

Under the Cherokee law, a grand juror is a quasi officer; his term of office continues from the second Monday in May of one year until that time in the next year. This grand jury of five that indicted the petitioner, Talton, had been selected under the law then in existence, constituting five a legal grand jury, and they were selected and empanelled to serve for a year from that time. And why may they not legally serve for that time, when we have seen that the law of November 28, 1892, could not possibly go into effect until the expiration of their term of office?

In the case of *Bowen vs. Lease, 5 Hill, N. Y., 226*, Chief Justice Nelson said:

"As laws are presumed to be passed with deliberation and full knowledge of all existing laws on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable."

Mr. Endlich, in his work on the *Construction of Statutes*, speaking as to the time when repeal takes effect, gives the following:

"SEC. 489. TIME WHEN REPEAL TAKES EFFECT.—The 13th and 14th Victoria, Chapter 21, Section 6, declares that when any act repeals another in whole or in part, and substitutes some provision or provisions in lieu of the provision or provisions repealed the latter remain in force until the substituted provision or provisions come into operation by force of the last-made act."

And this, he says, is only declaratory of the common law rule.

Bishop, on *Statutory Crimes, sec. 31*, says:

"A statute which is to become a law at a future day is a nullity in the meantime. It does not even operate as a notice to persons to be affected by it, nor does a repeal clause in it put an end to the law to be repealed."

To the same effect is the decision in—

McArthur vs. Franklin, 16 Ohio St., 193, and
Spaulding vs. Alford, 1 Pickering, 33.

Taking the rule laid down in *Red Rock vs. Henry, supra*, and applying to it the rule laid down by Bishop, that "Interpretation will lean strongly to avoid absurd consequences, injustice and even great inconvenience" (*Bishop on Statutory Crimes, sec, 82*), there will be no difficulty in reaching the conclusion that the prior law of the Cherokee Nation which authorized a grand jury of five continued in force until the act requiring thirteen could go into effect, on the second Monday in May, 1893, following.

So in any view the writ should be denied.

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